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TRANSCRIPT OF RECORD

Supreme Court of the United States

DOCKETED TERM 1963

No. 389

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, ET AL, PETITIONERS,

vs.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR HABEAS CORPUS FILED MARCH 12, 1963

HABEAS CORPUS GRANTED MAY 12, 1963

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APPENDIX

UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

Where a charge is filed by a labor organization or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g) and (h) of the National Labor Relations Act.

Case No. 3-CC-106.

Date Filed. March 14, 1960.

INSTRUCTIONS: *File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which such alleged unfair labor practice occurred or is occurring.*

1. Labor Organization or its Agents Against Which Charge is Brought

Name

Local Union No. 5895, United Steelworkers of America, AFL-CIO, United Steelworkers of America, AFL-CIO, John Kowalski, individually and as staff representative of United Steelworkers, Francis Brewster, individually and as President of Local Union No. 5895.

The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section 8(b) Subsection (s) 3 of the National Labor Relations Act, and these unfair

labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (*Be specific as to facts, names, addresses, plants involved, dates, places, etc.*)

On March 7 and 11, 1960 at the Thompson Road Plant of Carrier Corporation, the above named labor organizations and individuals, and their agents and persons acting in concert with them, through unlawful and illegal mass picketing, by blocking the entrances to said plant and by physical force and assaults restrained and coerced employees of Carrier Corporation in the exercise of their rights guaranteed by Section 7 of said Act to work at said plant and to refrain from engaging in, assisting or supporting a strike being conducted at said plant by the above named labor organizations and individuals, and did prevent employees of Carrier Corporation from the exercise of their rights guaranteed by said Act. Said organizations and individuals on March 11, 1960 publicly stated that they would continue to prevent all persons from entering or working in said plant.

3. Name of Employer
Carrier Corporation.

4. Location of Plant Involved (*Street, City and State*)
300 South Geddes, Street, Syracuse, New York, and Carrier Parkway, Syracuse, New York.

5. Type of Establishment (*Factory, mine, wholesaler, etc.*)
Factory.

6. Identify Principal Product or Service
Air conditioning equipment for consumer use and United States Armed Forces.

7. No. of Workers Employed
5,500.

8. Full Name of Party Filing Charge
Carrier Corporation.

9. Address of Party Filing Charge (*Street, City, and State*)
Carrier Parkway, Syracuse, New York.

10. Tel. No.
HO 3-8411.

11. Declaration.

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ **DAVID W. JASPER**
(Signature of representative or
person making charge)
Vice-President
(Title or office, if any)

March 12, 1960.
(Date)

Wilfully False Statements on this charge can be punished
by Fine and Imprisonment (U. S. Code, Title 18, Section
1001.)

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

**CHARGE AGAINST LABOR ORGANIZATION
OR ITS AGENTS**

Where a charge is filed by a labor organization or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g) and (h) of the National Labor Relations Act.

Case No. 3-CB-439.

Date Filed. March 14, 1960.

INSTRUCTIONS: *File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which such alleged unfair labor practice occurred or is occurring.*

1. Labor Organization or its Agents Against Which Charge is Brought.

Name

Local Union No. 5895, United Steelworkers of America, AFL-CIO, United Steelworkers of America, AFL-CIO, John Kowalski, individually and as staff representative of United Steelworkers, Francis Brewster, individually and as President of Local Union No. 5895.

Address

104 Magnolia Street, Syracuse, New York.

The above-named organization(s) or its agents has

(have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section 8(b) Subsection (s) 4 of the National Labor Relations Act.

On March 11, 1960 to the Thompson Road Plant of Carrier Corporation, the above named organizations and individuals, and their agents and persons acting in concert with them, attempted by oral statements and by unlawful and illegal use of force and restraint by mass picketing and by blocking the railroad tracks with their persons, and with motor vehicles, and by greasing the railroad tracks and switches, to prevent, restrain and coerce the New York Central Railroad Company and its employees from doing business with Carrier Corporation and from accepting, transporting and handling products being shipped in interstate commerce from said plant of Carrier Corporation.

On March 11, 1960 at the Geddes Street Plant of Carrier Corporation, the above named labor organizations, and individuals, and their agents and persons acting in concert with them, attempted by oral statements and by unlawful and illegal use of mass picketing, and by force and restraint, by blocking the railroad tracks with their persons and motor vehicles to prevent, restrain and coerce the Delaware, Lackawanna and Western Railroad Company, and its employees, from doing business with Carrier Corporation and from transporting and handling in interstate commerce products being shipped into said plant and on said occasion prevented said railroad from delivering interstate shipments to said plant.

4. Location of Plant Involved (*Street, City, and State*)

300 South Geddes Street, Syracuse, New York, and
Carrier Parkway, Syracuse, New York.

5. Type of Establishment (*Factory, mine, wholesaler, etc.*)

Factory.

6. Identify Principal Product or Service.

Air conditioning equipment for consumers and United States Armed Forces.

7. No. of Workers Employed.

5,500.

8. Full Name of Party Filing Charge.

Carrier Corporation.

9. Address of Party Filing Charge (Street, City and State)

Carrier Parkway, Syracuse, New York.

10. Tel. No.

HO 3-8411.

11. Declaration.

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ DAVID W. JASPER

(Signature of representative or
person making charge)

Vice-President

(Title or office, if any)

March 12, 1960.

(Date)

Wilfully False Statements on this charge can be punished by Fine and Imprisonment (U. S. Code, Title 18, Section 1001).

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE AND DOCKET ENTRY

March 14, 1960..... Charge filed in Case No. 3-CB-106.

March 14, 1960..... Charge filed in Case No. 3-CC-439

April 8, 1960..... Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued.

April 29, 1960..... Answer of Respondent Local Union No. 5895, United Steelworkers of America, AFL-CIO, and Respondent United Steelworkers of America, AFL-CIO, filed.

May 10, 1960..... Hearing opened.

May 12, 1960..... Hearing closed.

September 29, 1960.. Trial Examiner's Intermediate Report and Recommended Order and Order Transferring Case to the National Labor Relations Board issued.

October 21, 1960,... Respondents' Request for Extension of Time In Which To File Exceptions sent.

October 24, 1960.... Said request received by National Labor Relations Board.

October 24, 1960.... Extensions of Time In Which To File Exceptions granted.

October 27, 1960.... Motion to Adopt Findings, Conclusions, and Recommendations of the Trial Examiner filed.

November 15, 1960.. Order Denying Motion issued.

- July 13, 1961.....Decision and Order of the National Labor Relations Board issued.
- July 14, 1961.....Petition for Review in Case No. 27079 filed.
- August 2, 1961.....Petition for Enforcement of an Order of the National Labor Relations Board filed in Case No. 17105.
- August 2, 1961.....Answer of National Labor Relations Board to Petition for Review of Its Order filed.
- August 2, 1961.....Motion by National Labor Relations Board for Consolidation of Cases for Purposes of Record, Brief and Argument filed.
- August 25, 1961.....Answer to Petition for Enforcement filed.

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

LOCAL UNION NO. 5895, UNITED
STEELWORKERS OF AMERICA,
AFL-CIO; UNITED STEELWORK-
ERS OF AMERICA, AFL-CIO;
JOHN KOWALSKI, STAFF REP-
RESENTATIVE OF UNITED
STEELWORKERS OF AMERICA,
AFL-CIO; and FRANCIS BREW-
STER, PRESIDENT OF LOCAL
UNION NO. 5895, UNITED STEEL-
WORKERS OF AMERICA, AFL-
CIO

and

Case No. 3-CC-106

CARRIER CORPORATION

LOCAL UNION NO. 5895, UNITED
STEELWORKERS OF AMERICA,
AFL-CIO; UNITED STEELWORK-
ERS OF AMERICA, AFL-CIO;
JOHN KOWALSKI, STAFF REP-
RESENTATIVE OF UNITED
STEELWORKERS OF AMERICA,
AFL-CIO; and FRANCIS BREW-
STER, PRESIDENT OF LOCAL
UNION NO. 5895, UNITED STEEL-
WORKERS OF AMERICA, AFL-
CIO

and

Case No. 3-CB-439

CARRIER CORPORATION

ORDER CONSOLIDATING CASES, CONSOLIDATED
COMPLAINT, AND NOTICE OF HEARING

It having been charged in Case No. 3-CC-106 and in Case

No. 3-CB-439 by Carrier Corporation, herein called Carrier, that Local Union No. 5895, United Steelworkers of America, AFL-CIO, herein called Respondent Local Union No. 5895; United Steelworkers of America, AFL-CIO, herein called Respondent Steelworkers; John Kowalski, Staff Representative of United Steelworkers of America, AFL-CIO, herein called Respondent Kowalski; and Francis Brewster, President of Local Union No. 5895, United Steelworkers of America, AFL-CIO, herein called Respondent Brewster, have engaged in, and are engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, by the undersigned Acting Regional Director for the Third Region, having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary costs or delay,

HEREBY ORDERS, pursuant to Section 102.33 of the Board's Rules and Regulations—Series 8, that these cases be, and they hereby are, consolidated.

Said cases having been consolidated for hearing, the General Counsel of the Board, on behalf of the Board, by the undersigned Acting Regional Director, pursuant to Section 10 (b) of the Act and the Board's Rules and Regulations, Series 8, Section 102.15, hereby issues this Consolidated Complaint and Notice of Hearing and alleges as follows:

I

A copy of the charge in Case No. 3-CC-106 filed on March 14, 1960, was served on Respondents by registered mail on March 14, 1960.

A copy of the charge in Case No. 3-CB-439 filed on March 14, 1960, was served on Respondents by registered mail on March 14, 1960.

II

Carrier is, and has been at all times material herein, a corporation duly organized under the laws of the State of Delaware.

At all times hereinafter mentioned, Carrier has maintained and operated its office and principal place of business at Syracuse, New York, where it is engaged in the manufacture of air conditioning, refrigeration and heating systems in air and gas compressor machinery.

III

Carrier, in the course and conduct of its operations at Syracuse, New York, during 1959, a representative year, caused to be manufactured, sold and distributed products valued in excess of \$1,000,000, of which products valued in excess of \$50,000 were shipped from said plant in interstate commerce directly to states of the United States other than the State of New York.

IV

Carrier is now, and has been at all times material herein, engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

V

(a) Local Union No. 5895, United Steelworkers of America, AFL-CIO is a labor organization within the meaning of Section 2 (6) and (7) of the Act.

(b) United Steelworkers of America, AFL-CIO is a labor organization within the meaning of Section 2 (6) and (7) of the Act.

(c) At all times material herein, John Kowalski was the staff representative of Respondent Steelworkers and acted as an agent and authorized representative of said Respondent Steelworkers.

(d) At all times material herein, Francis Brewster was President of Local 5895, United Steelworkers of America, and acted as an agent and authorized representative of said Respondent Local Union No. 5895.

(e) At all times material herein, Jay Sherman was Secretary of Local 5895, United Steelworkers of America, and acted as an agent and authorized representative of Respondent Local Union No. 5895.

(f) At all times material herein, Roy Avery, Charles Bevareni, Wesley Carver, David Halstead, Louis Hosid, and Frank Stirpe were employees of Carrier and members of Respondent Local Union No. 5895 who participated in the strike and picketing described in paragraphs VIII and IX herein.

(g) During the course of their participation in the said strike and picketing described in paragraphs VIII and IX herein, the said Roy Avery, Charles Bevareni, Wesley Carver, David Halstead, Louis Hosid, and Frank Stirpe acted as agents and authorized representatives of said Respondent Local Union No. 5895.

VI

New York Central Railroad Company, herein called New York Central, is now, and has been at all times material herein, an interstate carrier by railroad, engaged, among others, in the hauling of freight, and is a person engaged in commerce under the Act.

VII

At all times material herein, New York Central was engaged in the hauling of freight for Carrier and other employers in the City of Syracuse, New York.

VIII

Since prior to March 11, 1960, Respondents have had a labor dispute with Carrier, and have been engaged in a strike and did authorize, establish and maintain pickets at various entrances to the Carrier plant in Syracuse, New York.

IX

On or about March 11, 1960, and since that date, and in furtherance of its dispute with Carrier, Respondents did authorize, establish and maintain pickets at the premises of New York Central adjacent to the Carrier plant on Thompson Road in Syracuse, New York.

X

On or about March 11, 1960, and since that date, Respondents, by their officers, agents and representatives, did order, instruct and appeal to employees of New York Central and employees of other employers to cease work for their respective employers.

XI

By the acts and conduct set forth in Paragraphs IX and X above, and by other acts and conduct, Respondents have engaged in, and are engaging in, and have induced and encouraged, and are inducing and encouraging, individuals employed by New York Central and by other persons engaged in commerce or in industries affecting commerce, to

engage in strikes or refusals in the course of their employment to use, manufacture, process, transport or otherwise handle, or work on goods, articles, materials or commodities, or perform services for their respective employers, and have threatened, coerced and restrained New York Central and other persons engaged in commerce or in industries affecting commerce.

XII

An object of the acts and conduct engaged in by Respondents as set forth in Paragraphs IX, X, and XI above, is and has been to force or require New York Central and other persons engaged in commerce or in industries affecting commerce, to cease using, selling, handling, transporting or otherwise dealing in the products of, and to cease doing business with Carrier.

XIII

Respondents by their following named officers, agents and representatives, on or about the dates set aside opposite the name, restrained and coerced, and is restraining and coercing, the employees of Carrier and New York Central, and of other employers, by the following acts and conduct:

(a) Threatening to inflict injury on and to cause other harm to various employees, including certain of Carrier's employees, who were engaged in taking photographs at the plant entrances to Carrier and at the premises of New York Central.

Roy Avery—March 11, 1960

Leslie Carver—March 11, 1960

Louis Hosid—March 11, 1960

(b) Threatening to inflict bodily injury on and to cause other harm to various employees, including certain of Carrier's employees, if these employees refused or failed to observe the picket line established by Respondents as described hereinabove.

Leslie Carver—April 5, 1960

Joseph Larkey—March 11, 1960

Louis Hosid—March 11, 1960

Ralph Baker, Jr.—April 5 and 7, 1960

Howard Schultz—April 5, 1960

Arthur Calland—April 5, 1960

(c) Obstructing, blocking and preventing ingress and egress by employees of Carrier and of other employers at entrances to the Carrier plant in Syracuse, New York.

Francis Brewster—March 11, 1960

David Halstead—March 7, 1960

John Kowalski—March 7 and 11, 1960

Jay Sherman—March 7, 1960

Frank Stirpe—March 11, 1960

(d) Obstructing, blocking and preventing ingress and egress by employees of New York Central at entrances to the premises of New York Central adjacent to the Carrier plant on Thompson Road in Syracuse, New York.

John Kowalski—March 11, 1960

Francis Brewster—March 11, 1960

as well as various pickets and strikers.

XIV

By the acts described in Paragraphs IX, X, XI and XII above, and by each of said acts, for the objects de-

scribed in Paragraph XIII above, Respondents did engage in and are engaging in unfair labor practices within the meaning of Section (b)(4)(i) and (ii)(B) and Section 2 (6) and (7) of the Act.

XV

By the acts described in Paragraph XIII above, and by each of said acts, Respondents did engage in and are engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) and Section 2 (6) and (7) of the Act.

XVI

The activities of Respondents described in Paragraphs IX, X, XI, XII and XIII above, carried out for the objects described in Paragraph XII above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XVII

The aforesaid acts of Respondents constitute unfair labor practices affecting commerce within the meaning of Section 8 (b) (4) (i) and (ii) (B), Section 8 (b) (1) (A) and Section 2 (6) and (7) of the Act.

WHEREFORE CLAUSE AND NOTICE OF HEARING

PLEASE TAKE NOTICE that on the 10th day of May, 1960, at 10:00 a.m., Eastern Daylight Saving Time, United States Post Office Building, Syracuse, New York, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations

set forth in the above Consolidated Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondents shall file with the undersigned Acting Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to said Consolidated Complaint within ten (10) days from the service thereof and that unless it does so all of the allegations in the Consolidated Complaint shall be deemed to be admitted to be true and may be so found by the Board.

DATED at Buffalo, New York this 8th day of April, 1960.

/s/ THOMAS H. RAMSEY
Thomas H. Ramsey
Acting Regional Director
National Labor Relations Board, Region 3
Room 112, U. C. Court House
68 Court Street
Buffalo 2, New York

BEFORE THE NATIONAL LABOR RELATIONS BOARD

• • • (Caption—3-CC-106 and 3-CB-439) • • •

RESPONDENTS ANSWER

Respondents above named, by McMAHON & CROTTY, (THOMAS P. McMAHON of Counsel) their attorneys herein, in answer to the complaint,

1. Admits the allegations contained in the paragraphs numbered I, II, III, IV, VI, VII, and VIII. Admits the allegation of the paragraph numbered V as is alleged in (a), (b), (e), and (f) and so much of the other matters of the paragraph numbered V, which allege that.

V. (c). John Kowalski was and is a Staff Representative of the United Steelworkers of America.

(d) Francis Brewster was President of Local 5895, United Steelworkers of America.

(e) Jay Sherman was Secretary of Local 5895 of the United Steelworkers of America.

2. Deny the allegations set forth in the paragraphs numbered "V (g)", and each and every other allegation in said complaint contained except with regard to the paragraph numbered IX, respondents admit that they picketed in the vicinity of the Railroad entrance to the Carrier Plant on Thompson Road.

WHEREFORE, Respondents demand that the complaints be dismissed.

Dated at Buffalo, New York this 26th day of April, 1960.

/s/ **THOMAS P. McMAHON**
Thomas P. McMahon
McMahon & Crotty
Attorney for Respondents
4028 Liberty Bank Building
Buffalo, New York

TO: Thomas H. Ramsey, National Acting Director
National Labor Relations Board
Room 112, U. S. Court House
68 Court Street
Buffalo 2, New York
Original and Four (4) copies
Carrier Corporation
Thompson Road
Syracuse, New York

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

THIRD REGION

In the Matter of:

**LOCAL UNION No. 5895, UNITED
STEELWORKERS OF AMERICA,
AFL-CIO; UNITED STEELWORK-
ERS OF AMERICA, AFL-CIO;
JOHN KOWALSKI, STAFF REP-
RESENTATIVE OF UNITED
STEELWORKERS OF AMERICA,
AFL-CIO; AND FRANCIS BREW-
STER, PRESIDENT OF LOCAL
UNION NO. 5895, UNITED STEEL-
WORKERS OF AMERICA, AFL-
CIO (CARRIER CORPORATION)**

Case No. 3-CC-106

Case No. 3-CB-439

Room 290 E Federal Building,
Syracuse, New York,
Tuesday, May 10, 1960.

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PROCEEDINGS

TRIAL EXAMINER MAHER: The hearing will be in order.

At the outset I will have to direct that there will be no smoking. I will attempt to provide as many smoke breaks as all of us can use; but in the meantime, this is an official hearing, and the usual decorum will be observed.

Off the record.

(Discussion off the record.)

TRIAL EXAMINER MAHER: The hearing will be in order.

This is a formal hearing before the National Labor Relations Board in the Matter of Local Union No. 5895, United Steelworkers of America, AFL-CIO, and United Steelworkers of America, AFL-CIO; John Kowalski, Staff Representative of United Steelworkers of America, AFL-CIO, and Francis Brewster, President of Local Union No. 5895, United Steelworkers of America, AFL-CIO, and Carrier Corporation, in Case No. 3-CC-106, and in the brother case of Local Union No. 5895 and all of the parties as I have previously mentioned them, in Case No. 3-CB-439.

The Trial Examiner conducting this hearing is Thomas F. Maher.

Will Counsel and other representatives please state their appearances for the record?

MR. NAIMARK: Counsel for General Counsel, William Naimark, Third Region, Buffalo, New York.

4 **MR. LYNCH:** Counsel for Carrier Corporation, Hancock, Dorr, Ryan & Shove, 800 Hills Building, Syracuse, New York.

I would also like to note the appearance of David W. Jasper, James H. Greene, Of Counsel, Carrier Parkway, Syracuse, New York. He is General Counsel of Carrier Corporation.

TRIAL EXAMINER MAHER: How do you spell your name, sir?

MR. LYNCH: L-y-n-c-h.

TRIAL EXAMINER MAHER: You?

MR. McMAHON: McMahon & Crotty, M-c-M-a-h-o-n and C-r-o-t-t-y, Thomas P. McMahon, Counsel.

TRIAL EXAMINER MAHER: Is that all for Respondents? For the Union Respondents? Are the individuals—

MR. McMAHON: I don't know if the individuals are represented by Counsel or not. I don't know if they have been served notice in their individual capacity or not.

TRIAL EXAMINER MAHER: Is anybody present that can enlighten me on that?

(No response.)

7. TRIAL EXAMINER MAHER: Back on the record. Let the record show at this time that no appearances have been entered for Respondent John Kowalski, Staff Representative of the United Steelworkers, AFL, nor for Francis Brewster, President of Local Union No. 5895, United Steelworkers of America, AFL-CIO, both individual Respondents in Cases Nos. 3-CC-106 and 3-CB-439.

Without objection, General Counsel's Exhibits 1-A through 1-H is admitted into evidence.

(The documents heretofore marked General Counsel's Exhibits 1-A through 1-H for identification, were received in evidence.)

MR. McMAHON: May I have my concession limited to the point that I agree that these exhibits are what they purport to say, and this is the original charge, and there is an affidavit of service; that my concession doesn't go to any matters that are contained therein.

8. TRIAL EXAMINER MAHER: That is certainly understood, sir.

TRIAL EXAMINER MAHER: I might suggest, Mr. Naimark, at some time before the first witness is called, that you outline for me and for the record the position of General Counsel as taken with respect to the violations charged and under which the complaint is issued here so that I may have some understanding of what is happening here, and I can make more intelligent rulings as the occasion arises.

MR. NAIMARK: Yes, sir.

At this time General Counsel moves to amend paragraph XIII of the complaint as follows:

With respect to paragraph (a) I move to amend the complaint to add the names Ray Antolini—

TRIAL EXAMINER MAHER: That is 13 (a) ?

MR. NAIMARK: That is correct. March 11, 1960. Kenneth Lyons, March 11, 1960: David Halstead between
9 March 11 and April 4, 1960. Irving Talbot, between March 11 and April 4, 1960.

TRIAL EXAMINER MAHER: I do not see Talbot on the list you have supplied us.

MR. NAIMARK: The fourth name.

TRIAL EXAMINER MAHER: I stand corrected.

MR. NAIMARK: John, first name being unknown, Hunkins, week of April 17, 1960.

That is with respect to Paragraph (a).

With respect to Paragraph (b), delete the names Joseph Larkey, and the date set opposite his name; Ralph Baker, Jr., and the date set opposite his name; Howard Schultz, and the date opposite his name, and adding the following names: Dominick Albanese, March 11, 1960; Kenneth Lyons, March 11, 1960; John Kowalski, March 11, 1960.

And with respect to Paragraph (c) adding the names Arthur Calland, March 2 and 4, 1960; Larry Roach, April 4, 1960, and Kenneth Lyons, March 3, 1960.

And with respect to Paragraph (d) adding the names Jay Sherman, March 11, 1960; Louis Hosid, March 11, 1960, and Paul King, March 11, 1960.

By adding clause (e) to paragraph 13 to read as follows: assaulting and inflicting physical injury and harm to various individuals, in the presence of various employees of Carrier and officers or representatives of Respondent 10 Unions, at entrances to the plant of Carrier, and at the entrance to the premises of New York Central adjacent to the Carrier plant on Thompson Road, in Syracuse, New York.

And the following names: Roger Potter, March 11, 1960—

MR. McMAHON: Where is this?

TRIAL EXAMINER MAHER: On the bottom, the last one, at "John", the first name being unknown—

MR. NAIMARK: Arthur Calland, April 6, 1960, and Harland Wallace, April 4, 1960.

That comprises the proposed amendment, and I, just for the record and for the Examiner's information, wish to state that General Counsel advised Mr. McMahon on the 5th of May of his intention to amend the paragraph in this respect.

TRIAL EXAMINER MAHER: In what manner did you advise Counsel?

MR. NAIMARK: By telephone, Mr. Examiner.

TRIAL EXAMINER MAHER: Mr. McMahon.

MR. McMAHON: The respondents—

TRIAL EXAMINER MAHER: You may be seated, if you wish.

MR. McMAHON: The respondents object to the motion to amend the complaint at this time on the ground that it would be a denial of the due process of law.

I did receive a telephone call on I believe it was last Thursday, if that was the 5th of May, and I thanked Mr. Naimark for advising me of these facts, but told him 11 I by no means would consent to this, and I would have something to say at this hearing, which I now propose to say.

That it seems to me grossly unfair, knowing that our offices are situated in Buffalo, New York, and to talk about an outfit but it doesn't even indicate the place. There are two plants of Carrier, as you might know. I think it is fair to say that some of them, I am told, and that all of these amendments relate to the Thompson Road plant, but that doesn't appear on the record as of yet.

Now, it seems to me grossly improper and no good cause shown for matters which are alleged to have happened on March 11, 1960, over two months ago, based on a complaint that was charged, complaint and other matters which were served under date of March 14, 1960. I see absolutely no reason, no good cause shown for proposals to amend the complaint at this particular time.

Secondly, I submit, even if there was a good reason, it is unfair and prejudicial to the respondents herein because they are being denied an adequate opportunity to prepare their defense.

They are being granted as a minimum the ten days' recess to submit their Answer, and for all those reasons, separately and in conjunction with one another, I submit

that the motion to amend the complaint should be denied, or at least it should be denied under the circumstances now proposed unless the defendants are to be given an adequate opportunity to prepare their defense in lieu of these matters.

TRIAL EXAMINER MAHER: At this time, before ruling on the motion, I think we have an additional appearance to make for the record, Mr. Greenburg?

MR. GREENBERG: I don't want to make a formal appearance.

MR. McMAHON: It is perfectly proper.

MR. GREENBERG: I am associated with Mr. McMahon in this case, Isadore Greenberg, 600 Lafayette Building, on behalf of the Respondent.

TRIAL EXAMINER MAHER: Do I understand that you are appearing only for the Respondent Unions?

MR. GREENBERG: Yes.

TRIAL EXAMINER MAHER: And not for the individual Respondents?

MR. GREENBERG: I am for the Respondents.

MR. McMAHON: No, you appear for the Local Union.

MR. GREENBERG: Local No. 5895.

TRIAL EXAMINER MAHER: All right. I want to make that straight.

Mr. Naimark, before I rule on this motion, this amendment, do you care to address yourself to the objections raised by Counsel?

MR. NAIMARK: Just to say that, well, may I ask Counsel whether he also objects to the deletion of—
13 the proposed deletions as well?

MR. McMAHON: I see no reason for having to reply to that. You have made your complaint, and it is reasonably clear. I submit that I submitted a very clear Answer as to these pleadings, so we might have an orderly presentation of the proof, and I think it is grossly unfair and prejudicial to ask us at this time to be prepared to meet evidence as to individual persons and matters which are alleged to have happened on March 11, and then what is even more grossly improper is to be met with the suggestion that we are to meet—to prepare a defense to matters which are alleged to have happened some time between March 11 and April 4, 1960, and such matters as that.

MR. NAIMARK: Well, I take that to be a repetition of what you said before.

MR. McMAHON: Yes, sir.

MR. NAIMARK: And I find that I am unable to be sympathetic because the—

MR. McMAHON: I am not soliciting your sympathy. I made the objection.

MR. NAIMARK: Do you want me to reply, Mr. Examiner?

TRIAL EXAMINER MAHER: I do.

MR. NAIMARK: I thought you asked me.

I find that the amendments, and at least with respect to the names merely a recitation of additional people who committed the acts, and this was an attempt to be precise, and that is the reason we set them forth, and to delete the names of those we find and do not have evidence to support.

With respect to paragraph (e) we have alleged physical injury which arose out of the 8 (b) (1) (A) which has been

alleged, and in which I would assume, from the Answer, bring forth nothing but a denial, and which is nothing more or less than an allegation that is nothing further but collateral to the main allegation that was mentioned originally, and I say and fail to see what prejudice can stem from this particular amendment.

TRIAL EXAMINER MAHER: Now, if I may address myself to the motion to amend, to the objections thereto and to Counsel for General Counsel's reply, I would indicate, first, that I am particularly aware of the fact that Counsel for Respondent was advised of the amendments to be made on May 5th, five days before this date; and I am also aware of the fact that the materials that are proposed to be added to Paragraph XIII of the Complaint constitute further incidents directed to the violations originally alleged in the complaint in Paragraph XIII, so that actually the materials added are, as indicated by Counsel for General Counsel, matters in specificity and not new violations of the Act, and I would particularly direct my attention to the added clause (e) which not only sets forth new individuals involved in previous incidents, but 15 sets forth an entirely new incident, and I state with particular reference to this incident that it is not a newly alleged violation of the Act, but it is another incident being alleged as part of the general violations set forth in paragraph XIII.

And under all circumstances that I have set forth, being aware of them all, and conscious of the fact that Respondent has had some time to review the materials sought to be added, and conscious also of the fact that the usual ten days to answer applies to the Answer to the original complaint and not to any amendments which are made during the hearing; and with respect to the amendments which are offered at this time, I am fully aware of the purport

of Section 102.17 of the Board's rules and regulations which provide that any complaint may be amended upon such terms as may be deemed just at the hearing, until the case has been transferred to the Board.

I feel that Counsel for General Counsel has made every effort to be as just as he could be, under the circumstances, without going through the necessity of postponing this case unduly.

Accordingly I must rule that the amendments as offered by General Counsel will be accepted over Respondent Counsel's objections.

MR. McMAHON: And may I have an exception?

TRIAL EXAMINER MAHER: You certainly have it.

MR. McMAHON: In terms of keeping the record 16 clean, and not by way of further argument, would the record show that the phone call received was transmitted from and received in Buffalo, New York, which is approximately 200 miles from the witnesses, on Thursday afternoon last, and so that we have Saturday and Sunday, and so that actually I had two days in which to make an investigation, which I had no opportunity to do at all; and I think I have indicated that this is grossly unfair.

TRIAL EXAMINER MAHER: Yes.

Now, Mr. Naimark, might I suggest that the amendment which you have presented and read into the record, and presented to Counsel and myself in written memorandum form, that this be incorporated in the form of an exhibit, or if you prefer, I can submit it as a Trial Examiner's Exhibit so we have the exact wording and exact names and dates as a matter of record?

MR. NAIMARK: Yes, I so do.

18 MR. NAIMARK: I have one more very small amendment I propose with respect to Paragraph X of the complaint. After the word "appeal" add the words "to individuals" so that the paragraph will allege "appeal to individuals and to employees". Now, this is perhaps to obviate any technical objections, but at least it keeps the pleadings clear, and I did not apprise Counsel of this beforehand, but I don't know that it would—

TRIAL EXAMINER MAHER: What is the purpose of that amendment?

MR. NAIMARK: Well, in some instances it will appear that whatever appeals were made were made to individuals of the New York Central which may be supervisory individuals and/or may not be employees but may be individuals; and of course, under 8 (b) (4) instructions and the like to individuals are sufficient, and in some of these instances the people were supervisors rather than employees.

TRIAL EXAMINER MAHER: You are fearful
19 that the word "employee" as worded in Paragraph X in your complaint may be construed as a word of art under the definition of the statute and not to apply to people who are not statutory employees.

I would say this, that since the New York Central Railroad is not an employer under the Act, it being a carrier, and subject to the jurisdiction of other statutory provisions, that employees of that do not come under the terms of our Act's authority. I will say on the record that the "employee" as used here could not possibly be construed not a statutory construction, in a statutory sense, because the New York Central Railroad is not an employer under the Act. Is it? ♡

MR. NAIMARK: Well, yes.

TRIAL EXAMINER MAHER: It is an employer under the amendment?

MR. NAIMARK: Under the amendment they are, and I want to make sure—

TRIAL EXAMINER MAHER: I see your point, yes, yes. Under the amendment you have that. I was looking at it with a view to the railroad National Mediation Act and others where there is no jurisdiction, but I see your point.

MR. NAIMARK: I don't imagine it will change his Answer in any way. It doesn't call for any—

TRIAL EXAMINER MAHER: I will hear you on that, Mr. McMahon, before I rule as to individuals and employees.

MR. NAIMARK: That is right.

TRIAL EXAMINER MAHER: Mr. McMahon?

20 **MR. McMAHON:** I object to the characterization that just the mere fact that this wouldn't change my Answer from admit to deny, or to denial on information and belief—This has certainly—I wouldn't want to for a moment be considered as making invidious comments about Mr. Naimark for whom I have the highest regard.

While we are on the subject of railroading, it seems appropriate to remark that just because it wouldn't change my answer only meets the formalities, I assume we are going to have a hearing addressed to the merits of this matter, and whether the question, as I have argued before, is whether or not respondents are given an ample time to prepare their defense.

Now, when you say here that it is a technicality, and I

don't claim that I am misled by the thing, and I have no objection to it—I don't object to the characterization.

TRIAL EXAMINER MAHER: The motion to amend is granted, Mr. Naimark, and let the record show that Paragraph X of the complaint is physically corrected to reflect the amendment.

21 **MR. NAIMARK:** General Counsel's case is broken down, Mr. Examiner, into two parts.

There is the case, the CB case which deals with certain acts involving restraint and coercion under 8 (b) (1) (A), and they comprise for the most part conduct and actions by employees, pickets and Union officials which amounted to picketing and blocking and impeding the ingress

22 and egress of employees and other individuals to the Carrier Plant, requesting identification of employees before permitting them to enter, engaging in threats of violence to various individuals and employees of Carrier, and engaging in physical violence, which formed a part of our amendment this morning with respect to various individuals.

These particular individuals are not employees of Carrier. This refers to the 8 (b) (1) (A) aspect of the case. The second portion deals with a secondary boycott, and the General Counsel will show that in furtherance of a strike which the Steelworkers called on March 2, it engaged in certain actions on March 11 which comprise the basis of this 8 (b) (4) allegation.

The Carrier Corporation, which is enclosed by a fence, has deeded a certain portion of land with railroad tracks, which land belongs to the New York Central Railway and which is used exclusively by the New York Central Railway

and its employees, which railroad services Western Electric, Brace, Mueller & Huntley, General Electric, and Carrier, and which uses this entrance-way supposedly to make such service.

The property upon which it passes, in addition to property on either side, for a small space, is owned by New York Central, and the gate—there is a gate leading into this property through which the railroad passes coming from the opposite road, the west portion of Thompson 23 Road, and also it is owned by New York Central.

It is the contention, and it will be shown that the picketing done by the respondent is picketing of New York Central, and it is practically identical with the Great Northern Railway case, and amounts to inducement and encouragement of the New York Central Railway, which is a second employer, and which constitutes a violation under the Act.

MR. McMAHON: Mr. Trial Examiner, accepting the dichotomy proposed by Mr. Naimark as to the 8 (b) (1) (A) aspect of the matter, in so far as it alleges matters regarding violence and breach of the public peace and threatening of other officials, I think the Trial Examiner can take judicial notice, and I will submit the basis for actual notice of an order of the Supreme Court of the State of New York in and for the County of Onondaga, that based upon a complaint by the Carrier Corporation, the charging party herein, an order was entered pursuant to a stipulation of Carrier Corporation, and the order is as follows:

Ordered, adjudged and decreed that the respondents, their agents, servants and employees, and all persons acting under, for and in aid of, et cetera, the usual injunctive language, they are enjoined as follows:

1. From using violence, coercion, or unlawful means upon the employees of the plaintiff, and upon members of the public seeking access to plaintiff's premises, or
 24 approaching any of such persons at any place whatsoever in an offensive or disorderly manner, or in such manner as to provoke a breach of the peace;

2. From interfering with entrance to. From interfering with entrance to or egress from any entrance to the plaintiff's (Carrier) premises located in the Town of DeWitt and City of Syracuse, Onondaga County, New York, by plaintiff, its employees or any other person or persons who may have lawful occasion to enter or leave said premises.

Perhaps I misled you. This was the relief that was asked for in the complaint.

The actual order, adjudging and decreeing, is as follows:

"1. That the defendants may maintain not to exceed at any one time thirty pickets at the main personnel entrance designated as gate No. 1." And then I interpolate that the Thompson Road entrance is the main plant entrance of the company.

And then that the second (b) permits six pickets at all other entrances and ten pickets at the Gifford Street entrance to the plaintiff's premises. This is what they call Gettes Street.

"2. Said pickets will at all times keep out of the entrances and will stay beyond lines which will be painted or otherwise designated on the ground indicating entrance ways, except that the pickets may patrol across the entrance
 25 from Route 298 (designated as Gate No. 4), provided they make way and do not impede traffic or persons entering or leaving through said entrance.

3. That the pickets shall not molest anyone or interfere with ingress or egress to and from the entrance-ways to the aforesaid premises.

4. That the pickets shall at all times comport themselves in an orderly and peaceful manner without the use of threats or offensive conduct."

I wonder—there are in all twelve decrees, and it looks to me now that this is perhaps unfair to the stenographer to go on reading all these matters into the record.

Suffice it for my purposes to maintain that the courts of the State of New York having exercised their jurisdiction upon the instigation of plaintiffs, the charging parties herein, and noting particularly, Mr. Trial Examiner, the fact that the matter relating to this railroad entrance which attaches necessarily to the second part of the dichotomy which Mr. Naimark proposed was specifically excluded from the State Court proceeding, so it would seem to me that the charging party herein has all the relief that it is entitled to, and all that it has asked for. That there is no sense, no reason, and there are good reasons for proceeding, and there are good reasons why we should not hear further evidence on this particular matter unless and until such time as the General Counsel, pursuant to the authority of the Capital Service case might care in the State
26 Courts to divest that court of jurisdiction so we would not have two sovereigns proceeding against the same defendants on the same matters.

I might say this is quite different from the Thayer case in the First Circuit up in the Commonwealth of Massachusetts to which you refer because in Thayer they were there trying, the argument was by the Company, that the determination of the State Court was *res adjudicata* on

the matter of whether or not the principles involved in the Board matter were entitled to reinstatement.

That is not our case here at all. My argument here is a very simple one: That another sovereign by its court, has exercised jurisdiction over this matter and properly so, and has entered an order binding upon the defendants and all those acting as their agents or in concert with them.

TRIAL EXAMINER MAHER: Basically your argument is one of preemption?

MR. McMAHON: It is a reverse order of preemption, that is to say the State Court has expressed its jurisdiction, and I think the Congressional, the legislative history is clear that Senator Taft felt, and the other cases from the Garner case, as was alleged, referred to in the dicta in the Garner case, and going back to Allen Foundry and the rest, indicated these matters of violence,

and that the relief there involved were, and properly, matters of State action, and the State here, having acted first, and the res, they were able to win this res by the activities of the charging party and their learned Counsel, and it seems to me that therefore it would be improper for the United States to now proceed on the same matter or at least without paying deference to the State Court, of divesting it of jurisdiction as was done in Capital Service case.

But I admire your succinctness, it is a reverse preemption argument.

TRIAL EXAMINER MAHER: What is the date of the original application for State Court relief?

MR. McMAHON: The original application is under date of March 25, 1960, after the charge was filed.

TRIAL EXAMINER MAHER: After the charge, but not before?

MR. McMAHON: Well, I think that is significant. The show cause order issued by the State Court was under date of April 6, 1960.

Now, I just want to refer here to the date of the issuance of the order of consolidation. The order of consolidation I am not exactly sure what date that was entered.

TRIAL EXAMINER MAHER: The consolidation of the causes here before me?

MR. McMAHON: Yes.

TRIAL EXAMINER MAHER: Well, that would be —

MR. NAIMARK: April 8th.

TRIAL EXAMINER MAHER: April 8th. All 25 charges were rendered in advance of your State Court application?

MR. McMAHON: But the State Court has proceeded more properly and has indeed entered a final order, and I feel that it is improper for the Government to now, for the Federal Government to proceed when the State Government has exercised its jurisdiction.

That is a broad jurisdictional argument.

And the second argument that since the date of the signing of this order until the present, there has been no —

TRIAL EXAMINER MAHER: What was the date of the signing, sir?

MR. McMAHON: The date of the issuance of the order?

TRIAL EXAMINER MAHER: Yes, and by whom.

MR. McMAHON: Judge Farnham.

These were these papers that I was shuffling about before.

The order was entered on the 12th day of April, 1960; became effective that date.

The entry, the date of entry of the order I must confess I don't know. But that is when the order became effective.

TRIAL EXAMINER MAHER: You pinpointed it accurately enough for my purposes.

MR. McMAHON: Now, in addition, since the remedy—let's assume for a moment that an order were appropriate to be issued in an 8 (b) (1) type situation. That is to say, let's assume an 8 (b) (1) violation were proved, let's assume that on March 11, 1960 there were acts which, if proven, would constitute a violation of Section 8 (b) (1), it seems to me a fundamental rule, and possibly the only one that I really understand, that in applying the Act, that the Act works in future, that is to say, not to be punitive, but it is to be remedial.

There having been no acts shown since March 11, and now we hear of another matter on April 4. It seems to me that there is no cause for proceeding, for issuing an order when there are no incidents that have occurred since that time.

TRIAL EXAMINER MAHER: Are you discounting the effectiveness of the Board's customary cease and desist order when a violation has been found?

MR. McMAHON: I would not think it would be proper for—to start with—the powerful motors of the Federal Government to swat a fly, and to me I think we have to

show some continuity, and I don't think that because, as I say, conceding that there were one 8 (b) (1) violation or acts which in themselves would constitute it, that we now have to go through the long and arduous procedure of trying this whole matter out to issue a remedy about something that there is no necessity for the issuance of—if you pardon me for ending a sentence with a preposition.

30 TRIAL EXAMINER MAHER: There are worse things to end sentences with.

I have just a couple of questions on this point.

When was the Board served with your State Court action?

MR. NAIMARK: I personally was aware that there was a State Court order, but I don't believe we have any papers.

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31 TRIAL EXAMINER MAHER: In other words, Judge Brennan did not have 8 (b) (1) material before him?

MR. McMAHON: No, he did not, and this was specifically called to his attention, but I think this does serve notice that the State Court matter was proceeding, and they had notice of it.

TRIAL EXAMINER MAHER: One further question, and I think—

MR. McMAHON: I know of my own personal knowledge that if not Mr. Naimark, at least the Third Regional office had knowledge of the State Court action, and the order issued therein.

TRIAL EXAMINER MAHER: One further question, and I assume that it will be redundant in view of the answer to my previous one, and that is the General Counsel of the National Labor Relations Board did not appear, either in his own behalf, or in behalf of the Board, at any time in the State Court proceeding for any purpose to your knowledge?

MR. McMAHON: To my knowledge, no.

TRIAL EXAMINER MAHER: Mr. Naimark, do you have any information on that?

MR. NAIMARK: You are correct.

TRIAL EXAMINER MAHER: Does that dispose of your motion, sir?

MR. McMAHON: Yes. There are two parts.

One, the State Court exercises jurisdiction as to the very matters put in issue by the 8 (a) (1) charge—complaint.

TRIAL EXAMINER MAHER: The second part is futility?

32 **MR. McMAHON:** The second part is futility.

MR. LYNCH: May I state for the record that the office of Hancock, Dorr, Ryan & Shove, of which I am a member of the firm, did appear for the Carrier Corporation in the State Court proceeding, and to my knowledge there was no appearance whatever by the General Counsel.

TRIAL EXAMINER MAHER: Do you wish to be heard on this?

MR. NAIMARK: Not unless you wish it.

TRIAL EXAMINER MAHER: No.

At this time I would indicate on the record that I under-

stand the first portion of the Respondents' motion to dismiss the 8 (b) (1) (A) provisions of the complaint to be addressed to the exclusive jurisdiction which derived to the State Court by virtue of somebody getting to the State Court before the Board got under way with this particular case, thereby permitting the State Court to, if I may use the expression, preempt the jurisdiction from them irrespective of alleged violations of Section 8 (b) (1) (A) of the National Labor Relations Act.

MR. McMAHON: Will you suffer an interruption?

TRIAL EXAMINER MAHER: I certainly will.

MR. McMAHON: It wasn't someone who got to the State Court first, it was the charging party herein.

TRIAL EXAMINER MAHER: I concede that here.

33 MR. McMAHON: The Carrier Corporation.

TRIAL EXAMINER MAHER: In this connection I am passingly familiar with the authority on the subject, and I am also aware that the matter was in the hands of the Government for investigation and disposition prior to the initiation of the State Court action.

I certainly do not, by any ruling I might make here, intend to further deprive or impede the Government in its attempt to present an issue for determination, whether there be merit in the issue or not.

Accordingly, on the first ground, namely, jurisdiction of the State Court being exclusive, I will deny your motion at this time and entertain a proper exception, and certainly welcome materials on the matter in a brief which you may wish to submit hereafter.

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34 With regard to the second ground, that of futility, I am again aware that in many instances "much labor has brought forth small mice." But that is not for me to decide, and the Board in numerous cases has held that the gravity of the matter, and the fact that compliance in effect has been achieved has been no barrier to a continuation of the proceedings to their ultimate conclusions.

Again on that ground I will not deny your motion and also invite appropriate argument at the appropriate time, which you may wish to make.

. . .

MR. NAIMARK: I have some very brief stipulations that might help the record, and I will read them. There are only three, and ask Counsel for Respondent to stipulate to them:

1. That on January 15, 1960, United Steelworkers of America, AFL-CIO were certified as the bargaining agent for the production and maintenance workers of the Carrier plant in Syracuse, New York.

35 2. That the strike by Respondent Unions against Carrier commenced on March 2, 1960.

3. That Frank Soper is and was at all times material herein vice-president of Local 5895, United Steelworkers of America, AFL-CIO.

MR. McMAHON: May I have that one again?

MR. NAIMARK: Frank Soper, vice-president of Local 5895, United Steelworkers of America, AFL-CIO.

MR. McMAHON: Respondent will agree to those proposed stipulations.

TRIAL EXAMINER MAHER: The record will so note.

MR. NAIMARK: Now I have a series of exhibits, and I will only introduce at this time the ones that I have discussed with Mr. McMahon beforehand.

MR. McMAHON: Mr. Naimark, may I say that isn't it—didn't the stipulation relate in the main, if not exclusively, to the railroad gate aspect of your case?

MR. NAIMARK: Yes.

MR. McMAHON: Well, I wanted the Trial Examiner to note that.

MR. NAIMARK: Yes.

MR. McMAHON: And as to those pictures I have a comment, that it is part of our stipulation that you are to show the physical situation and not the incident itself.

MR. NAIMARK: That is correct.

36 Mark this Exhibit 2, 3, 4, 5, 6, 7. Maybe we ought to just take these first. These are marked on the back.

(Thereupon, photographs above referred to were marked General Counsel's Exhibits 2, 3, 4, 5, 6 and 7, inclusive, for identification.)

MR. McMAHON: Would you be good enough to make the appropriate comments as to what these purport to prove? What their purpose is?

MR. NAIMARK: I thought you wanted to look at them.

MR. McMAHON: I do.

MR. NAIMARK: GC 2 is a front picture looking from the west portion of Thompson Road across through to the east portion of Thompson Road, through the gate, and into the property which we contend is New York Central property and extending all the way back to the end of the premises. That is the railroad's premises.

Do you want me to do it that way?

MR. McMAHON: If you would, please.

As to Government Exhibit 2, my concession is the point of making unnecessary the photographer coming here to establish when he took this, and I am conceding that this is a reasonably accurate projection of this railroad gate about which you will hear so much. I don't want my concession to go beyond that.

TRIAL EXAMINER MAHER: And sticking strictly to geography.

MR. McMAHON: That is geography or photog-
37 raphy. I don't want the question of title—

TRIAL EXAMINER MAHER: That has nothing to do with who owns what?

MR. McMAHON: "Correct. Thank you.

MR. NAIMARK: General Counsel's Exhibit 3 is another photograph of the same area looking from the west side of Thompson Road and with the Brace-Mueller-Huntley factory in the background, and it is only offered for that purpose.

MR. McMAHON: As to this, Mr. Trial Examiner, if I might make a comment, it shows—a request is made on your judicial disinterest in that you are supposed not to note the men standing on the railroad tracks.

TRIAL EXAMINER MAHER: I will completely block that as I view this. All I see is a gate.

MR. McMAHON: And Brace-Mueller to the right of the gate.

MR. NAIMARK: Brace-Mueller-Huntley.

MR. McMAHON: Brace-Mueller-Huntley.

TRIAL EXAMINER MAHER: Off the record.

(Discussion off the record.)

MR. NAIMARK: GC 4 is likewise a view, a lateral view of the railroad, the gate only this time, Carrier is noticed in the background, and it also shows Thompson Road. It is the same as GC 3, except from the other side of the gate—of the tracks.

MR. McMAHON: Well, Mr. Trial Examiner, Mr. 38 Naimark is quite correct, but I said I would have no objection to the introduction of this exhibit, and we were again to make this entreaty to your disinterest.

I would like to ask Mr. Naimark if in view of the other pictures he has there, that the concession being to show the physical situation, I just wonder if this is necessary. If you want to hold me to my word, why, I will—

MR. NAIMARK: I am doing this for clarification of the record. I am not trying to prove too much by this except it likewise helps in analyzing a situation. I am only concerned with the fact that Carrier—and maybe this helps you more than me—that Carrier is in the background and shows the position of Carrier and none of the other pictures it seems do that.

MR. McMAHON: You point to this portion of Government Exhibit 4, and point to that area at the right side of the picture, and you say that that is all you are interested in showing?

MR. NAIMARK: That is true, and the gate. I am not interested in the men, if these were your men.

TRIAL EXAMINER MAHER: If the exhibit is offered for one purpose and accepted for that purpose, you can be

very sure it will be considered for the purpose offered and for no other.

MR. McMAHON: There is no other. With that assurance I have no objection.

MR. NAIMARK: GC 5 is looking from the railroad property, or from within inside the gate and with the gates open showing the gate swung open and looking outside the premises.

Now, this is shown not for the premises but is showing the picketing which existed on March 11.

TRIAL EXAMINER MAHER: Before you give us this last exhibit that you have offered for identification, might I suggest for the record that the three previous photographs when set side by side, reading from left to right, beginning with GC 4, then GC 2 and then GC 3, constitutes actually a panoramic view of the area on the left and right side of the disputed gate, or the gate at issue. And that the purpose of those three exhibits is to describe pictorially for the record the geographic or photographic panorama of that particular area?

MR. NAIMARK: That is correct.

MR. McMAHON: Thank you. That is correct.

TRIAL EXAMINER MAHER: O.K. Excuse me for the interruption, but at this point before getting on to something else, I wanted to earmark those things out of the way.

MR. NAIMARK: I might say parenthetically it might not be amiss for the Trial Examiner, while he is here, to some time observe the premises. It might be helpful, but that is within his discretion.

MR. McMAHON: Let me answer, if you do, I have some motions to make.

TRIAL EXAMINER MAHER: Notions or motions?

MR. McMAHON: Motions.

As to Government Exhibit 5, my concession is limited to this: That if the person who took this picture were present and testified, he would testify that on March 11, 1960, he was standing inside the gates, the railroad gates to the Carrier entrance and took this picture, and that I would only want to ask him how long—the split second of time in which this picture represents—

TRIAL EXAMINER MAHER: This is admitted or offered, as I understand it, for the pictorial description of the area.

MR. McMAHON: On this I understand its thrust is beyond that, to show that the picture was taken and that this was the result of that picture.

MR. NAIMARK: This was picketing on March 11, 1960.

Did you ask me something?

TRIAL EXAMINER MAHER: No.

MR. McMAHON: I don't think I did.

As to this I say my concession goes to the fact that if the photographer were called he would testify he took this picture.

MR. NAIMARK: And that it is an accurate and true representation of what he took.

MR. McMAHON: Yes, within that split second of time it takes to take a picture.

MR. NAIMARK: Right.

MR. McMAHON: My concession goes to relieving the necessity of calling the photographer in.

There are other ones to a concession that if—as to the other pictures, the concession goes beyond that to indicate that it is a fair representation, and with the right to correct ourselves later on these are best—

MR. NAIMARK: GC 6 is being offered, is a photograph of the automobile belonging to John Kowalski which is present on the railroad tracks on March 11, 1960.

MR. McMAHON: You have gone a step beyond that. You say that is present on the railroad tracks. Now, your question to me was—is that John Kowalski's car?

MR. NAIMARK: I withdraw the "railroad tracks", but it is a description or picture of John Kowalski's car and is John Kowalski's car.

MR. McMAHON: My concession is that I don't know who has legal title or ownership to this vehicle, but within the context of this lawsuit, I believe, and knowing what you are getting to, I think it is fair to say that to our best knowledge this is the car that John Kowalski drove on March 11.

MR. NAIMARK: That is sufficient.

MR. McMAHON: Now, we may be wrong about that, but I think we aren't.

42 MR. NAIMARK: Subject to change.

GC 7 is a picture showing the pickets at the time that the train belonging to the New York Central was proceeding west, from west to the easterly portion of Thompson Road, from the east to west. I beg your pardon.

MR. McMAHON: From east to west.

As to this our concession is that if the photographer were called, he would testify that on the afternoon of March 11 he took this picture and that it fairly represented what he saw at that time.

MR. NAIMARK: I have one more which isn't a picture

(Thereupon a document hereinafter referred to was marked General Counsel's Exhibit No. 8 for identification).

MR. NAIMARK: As General Counsel's No. 8, the deed dated May 9, 1949, from Carrier Corporation to the New York Central Railway which contains a certification of the County Clerk, and indicates that it was recorded the 21st day of May, 1949, and with special reference to Parcel 3, is the only parcel the General Counsel is concerned with, and which we maintain demonstrates the granting of the particular land we have reference to from Carrier to the New York Central.

MR. McMAHON: As to this, if— As to this Exhibit, Mr. Trial Examiner, I will appreciate your help in making my point clear.

I agree that this is a deed between Carrier Corporation, a Delaware corporation, and the New York Central Railroad, and that it is a true and accurate copy of the deed, and I waive the necessity of producing the original.

The instrument at that point speaks for itself, and I submit that neither you nor the august members of the National Labor Relations Board will be aided or helped in any manner by reading the description of the parcel No. 3, and I might say that I am in good company, because I am not aided by a reading.

It says, just to illustrate my point, it says "Beginning at the intersection of the easterly line of Thompson Road with the southerly line of the lands now owned by Carrier Corporation and running thence south 84 degrees, 58 minutes, 30 seconds east, et cetera, et cetera." Concluding

"thence south five degrees, 7 minutes, 30 seconds west along said easterly line of Thompson Road, 35 feet more or less to the place of beginning."

Now, if this helps you to determine the crucial question of who has title to this particular strip of land, in the absence of the survey, then I am frank to confess that you have legal powers and powers of interpretation far beyond mine.

Stating it differently for a minute, the concession is that this is a deed. I say now that its relevance is not shown, that its materiality is not shown, and that it has a 44 beguiling or soporific effect that might lead you or the Board to assume this particular strip of land has been deeded from Carrier to the New York Central, and I submit that even from a cursory reading of parcel No. 3 that I fail to see how that crucial question to the Government's lawsuit, as outlined in Counsel's opening remarks can be supported by this document.

So my objection then is that it is incompetent and irrelevant and that it lacks a proper foundation.

TRIAL EXAMINER MAHER: With particular reference to the deed being offered, I want to assure Counsel that neither I nor speaking for the Board, that the Board itself are susceptible to soporific treatment, so that you may be sure we will not be led astray by this document, should it be accepted.

Is this the extent of your offer now?

MR. NAIMARK: As far as exhibits, yes.

TRIAL EXAMINER MAHER: Then I can rule on everything.

MR. McMAHON: May I have one additional comment?

TRIAL EXAMINER MAHER: Surely.

MR. McMAHON: In discussing this matter with Mr. Naimark, I said this to him as I now say for the record that in the transactions for property in the State of New York and perhaps in other states and Commonwealths as well, it is the unvarying custom and practice to submit
45 a search or an abstract of title and a survey as a foundation for a deed; and that in the transaction between New York Central and Carrier Corporation that there was a survey, and I had asked him to produce this survey not in the—asking him to produce it not in any sense of a prediscovery form of a procedure, but rather to make—if he is to prove what he alleges, that this strip of land is owned by the New York Central, then I submit he should prove it in the proper way, that is to say, with the deed and the survey.

MR. NAIMARK: Mr. Examiner, may I reply in that respect?

It is our contention that the deed is presumptive evidence of property, but in order to help the record as well as whatever objections, tenable or otherwise, that Mr. McMahon has, we discovered only one survey, and I brought it in to the hearing.

We have no surveys such as might normally be made in an abstract or title, and I don't know whether, and I don't concede it is incumbent upon us to produce it, but we did produce a survey of Carrier's property in 1957 showing this particular land that he refers to, and I gave that to Mr. McMahon prior to the hearing, and he said that he would not stipulate to its introduction.

It was done by a firm of engineers in Syracuse, so I didn't offer it because I assume the proper way to prove

it, if it had to be proved, would be for us to call the
46 one who had made the survey.

TRIAL EXAMINER MAHER: Mr. Naimark, first let me dispose of General Counsel's Exhibits from 2 through 7, being photographs accurately described already on the record.

I will admit them into evidence for the purposes indicated at the time they were offered, and as stipulated by the parties.

(The documents heretofore marked General Counsel's Exhibits 2 through 7 for identification, were received in evidence.)

With respect to General Counsel's Exhibit No. 8, this deed, you indicate that you had the problem of introducing over objection of counsel a survey of the property which appears to be in serious dispute; at least the title to it appears to be in serious dispute.

Since by the very nature of things this deed which you offer as General Counsel's Exhibit No. 8 must relate directly to the survey which you are to introduce, or plan to introduce hereafter in some other fashion as you best decide, might I suggest that you withhold the offer of this General Counsel's Exhibit No. 8, the deed, and wrap them all in the same package and get them in together, because they must relate to one another, or something is wrong.

MR. NAIMARK: But I don't concede we need to introduce the survey. I was doing that to accommodate Mr. McMahon. I am only introducing the deed, thereby I
47 understand he has no objection to as far as its being a deed, but objects to its relevance or need.

TRIAL EXAMINER MAHER: If I properly under-

stand Mr. McMahon's position—I am butting in here so I am sure I have a right understanding—you have no objection to this as a description of the property?

MR. McMAHON: Oh, I do. I acknowledge that that is a deed between Carrier Corporation and the New York Central Railroad, because that is what it says on its face.

TRIAL EXAMINER MAHER: You object to—

MR. McMAHON: But I —

TRIAL EXAMINER MAHER: Let me finish. Your objection is to our ability, under the circumstances, to interpret what this accurately describes?

MR. McMAHON: Well, that there is no foundation for the introduction of that document at this time, for this reason:

Crucial to the Government's case as outlined in the opening statement by Mr. Naimark is to prove who has title to this relatively narrow strip of land running east and west across Thompson Road.

Now, there is a description which he points to as parcel No. 3, and I agree that parcel—there are words under Parcel No. 3, but it will not aid the Board and it is unfair and denies defendant—respondent the right to contest a crucial matter upon it. The Government has the
48 burden of proof, to wit, the proper way of proving title to real property in the State of New York or under the Federal rules, and I submit that the only proper way is to submit a survey—so that don't worry about accommodating me. There is a proper foundation for the introduction of proof to show title to real property, and you have to have a survey.

MR. NAIMARK: Now, I submit that the deed speaks

for itself, and if there is any question concerning its presumptive regularity so it would be incumbent upon Mr. McMahon to raise it—

MR. McMAHON: I deny that that describes the property which you claim is owned by the New York Central Railroad.

MR. NAIMARK: I might say we will have testimony from the New York Central in reference to this.

TRIAL EXAMINER MAHER: In reference to real property?

MR. NAIMARK: Yes, we will have the real estate agent here.

TRIAL EXAMINER MAHER: What I will suggest then is that this evidence, to avoid further dispute and conversation, which I don't think is getting us anywhere, that we reserve the offer of this document until further testimony is supplied so we can get it in with the least possible difficulty.

MR. NAIMARK: I will hold in abeyance my offer.

TRIAL EXAMINER MAHER: Yes. It is marked.

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50 **MELVIN C. HOLM,** a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER MAHER: Please be seated and give your name and address to the reporter.

THE WITNESS: My name is Melvin C. Holm, H-o-l-m.

51

DIRECT EXAMINATION

Q. (By Mr. Naimark) Mr. Holm, are you employed by Carrier Corporation?

A. I am.

Q. And what is your position?

A. Vice-President and Treasurer.

Q. And how long have you been employed by the company, approximately?

A. A little better than twenty-three years.

Q. Just generally what is the business of the company?

A. We are in the air conditioning business; commercial refrigeration, industrial refrigeration, and industrial heating, power generating equipment, air and gas compressors, residential heating, that sort of thing.

Q. And where is your main plant located?

A. Our main plant in so far as the headquarters operations is concerned, is located at Thompson Road outside the City of Syracuse. We have one other plant in this area on Geddes Street.

Q. Now, do you have plants in other parts of the country?

A. Yes, we do.

Q. But the main plant is located at Thompson Road, is it?

A. Our largest single installation is at Thompson Road, yes.

Q. Are your administrative offices and executive offices located there?

52 A. Yes.

MR. NAIMARK: Mark this exhibit.

(Thereupon the document hereinafter referred to was marked General Counsel's Exhibit No. 9 for identification.)

Q. (By Mr. Naimark) I show you what has been marked for identification as General Counsel's 9, and ask you to tell me what that is?

A. This is a map of our Thompson Road property.

MR. McMAHON: I move to strike the answer that it is a map, as being incorrect, and—

THE WITNESS: In layman's language, this is a map of our Thompson Road property. I don't know what the technical term is.

MR. McMAHON: It is a very technical matter, Mr. Holm, and in so far as this purports to describe in general outline the plants and grounds and the location of the properties of Carrier Corporation, I have no objection to it; but in so far as it gets to this question of title, Mr. Trial Examiner, and that is why—

MR. NAIMARK: That is not the purpose for which it is being offered. It is being offered for the purpose which you say you have no objection.

TRIAL EXAMINER MAHER: It is my understanding this will not be relevant to title unless further evidence is presented in support of it.

53 **MR. NAIMARK:** That is correct.

TRIAL EXAMINER MAHER: And further description of it.

MR. McMAHON: Maybe I am being premature, but I think this is the one we went over before.

MR. NAIMARK: Yes, but in view of your objection, we are not introducing it in reference to the matter of the title of the property.

TRIAL EXAMINER MAHER: You haven't offered it as yet, have you, Counsel?

MR. NAIMARK: No, I only asked him one question on it which was to get the—

THE WITNESS: It is the plot plant of our holdings at Thompson Road.

Q. (By Mr. Naimark) Does this show the various gate entrances to the property, Mr. Holm?

A. Yes, it does.

Q. Of the Carrier property?

A. Yes.

Q. And does it show the buildings thereon on Carrier property?

A. Yes, it does.

MR. NAIMARK: All right. Then I offer GC 9 in evidence merely for the purpose as I indicated.

MR. McMAHON: A plot plan?

54 MR. NAIMARK: A plot plan.

MR. McMAHON: I have no objection.

TRIAL EXAMINER MAHER: Without objection, G.C. 9 is admitted into evidence.

(The document heretofore marked General Counsel's Exhibit No. 9 for identification, was received in evidence.)

Q. (By Mr. Naimark) Referring to the GC 9, Mr. Holm, does this show the main entrance to the plant?

A. Yes, it does.

Q. And how is that described?

A. You are talking about personnel entrance?

Q. Yes.

A. The main personnel entrance at Thompson Road is known as Gate 1, toward the northern part of the plant, on Thompson Road.

Q. Is that marked "Personnel Entrance"?

A. Yes, that is Gate 1 right there.

Q. And on Thompson Road is there an entrance to the property, the main entrance or the personnel entrance?

A. The personnel entrance on Thompson Road is this one right here which I referred to as Gate 1.

Q. Is that the only one on Thompson Road?

A. We have a truck entrance down here known as Gate 2.

TRIAL EXAMINER MAHER: There are two entrances, if I may interrupt.

55 THE WITNESS: Yes, the one at the south is Gate 2 referred to as a truck entrance, and the one at the north.

TRIAL EXAMINER MAHER: No, in the upper—

THE WITNESS: Both of those together are known as Gate 1, that entire area.

TRIAL EXAMINER MAHER: Actually there are two gates, are there?

THE WITNESS: We use Gate 1 in a broad sense. There are two driveways, let me put it that way.

Q. (By Mr. Naimark) Is it separate, are the entrances separated by something, Mr. Holm?

A. No, not an island in the sense of an elevated island, merely an area between these two.

Q. Between the two?

A. Yes.

Q. How wide, if you know, approximately is each entranceway?

A. I do not know.

Q. All right.

A. I would have to guess, and I don't know.

TRIAL EXAMINER MAHER: Can I inject a question at this time?

THE WITNESS: Yes.

TRIAL EXAMINER MAHER: Is this plot plan drawn, as it is called, as far as you know, to scale?

56 **THE WITNESS:** I cannot give a—

TRIAL EXAMINER MAHER: Yes, the marginal information in the lower right-hand corner indicates it is a scale drawing, one inch equals 200 feet.

THE WITNESS: In the lower right-hand corner.

TRIAL EXAMINER MAHER: That satisfies my question.

Q. (By Mr. Naimark) Are the other entrances so marked on that, Mr. Holm, in green?

A. Yes, all the personnel entrances on this particular plot plan are marked in green, one on Route 298, as they call it, Carrier Parkway, over here Kinne North and Kinne South, and then on the south end of the property Robie Avenue entrance.

Q. Directing your attention to the marking "Railroad gate" do you know whether or not the employees of Carrier use that as a personnel entrance?

A. They do not.

TRIAL EXAMINER MAHER: Will you indicate that gate on the map, please?

MR. NAIMARK: It is marked in red.

TRIAL EXAMINER MAHER: All right, yes.

Q. (By Mr. Naimark) Do you know of your own knowledge whether any employees other than those of New York Central use that gate entrance?

A. To the best of my knowledge, it is used only by New York Central employees.

57 Q. Do you have a warehouse, Mr. Holm, that is noticed on this map?

A. Yes, our main warehouse is referred to on this plot plan as T B 19.

Q. And is that serviced by a railway entrance?

A. Yes..

Q. Is that designated on the map?

A. Yes, that is designated as track 12 which goes into the warehouse.

Q. Am I correct that the indications Brace-Mueller-Huntley and Western Electric are notations indicating that this is property of other companies besides Carrier?

A. That is correct.

Q. Is General Electric located, do they have a plant which is noticed on this map?

A. General Electric occupies a plan designated as T R 5.

Q. And is there any railway that leads into T R 5?

A. Not directly into T R 5. These railroads here are serviced here, this little ramp.

TRIAL EXAMINER MAHER: This railroad where?

THE WITNESS: Tracks 11 and 10.

TRIAL EXAMINER MAHER: Thank you.

Q. (By Mr. Naimark) Directing your attention to the marking Thompson Road, does Thompson Road extend the entire border of the Carrier property and does 58 that run in a north and south direction?

A. It does, and it is the Western border, or the western side of our main property here, if that is what your question is.

Of course, we own property across the road to this parking lot.

MR. McMAHON: I don't want to get into a formal objection, but Thompson Road is not the western border—obviously there are—

THE WITNESS: I think I corrected myself, Mr. McMahon. Thompson Road is west of our main properties.

MR. McMAHON: Isn't it sufficient to say Thompson Road is where it is shown on this plot plan?

MR. NAIMARK: Yes, that is sufficient.

Do you know the width of Thompson Road west to east?

A. No, I do not. I think it may be indicated. I am not sure.

Q. Is the parking lot A a parking lot which is indicated on the map, a parking lot for Carrier employees?

A. Yea, it is.

59 Mr. Holm, does Carrier have occasion to do business with New York Central Railway?

A. Yea, it does.

Q. What is the nature of the business?

A. Bringing in of raw materials and parts to some extent, and the shipment of finished goods in and out.

Q. And does that map that I showed you before indicate the railroad tracks used by the New York Central in connection with this business?

A. Yea, it does.

Q. There is a gate, I believe, through which this railroad passes, Mr. Holm?

A. That is correct.

66 **ROBERT E. BEDWORTH**, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER MAHER: Please be seated and give your name and address to the reporter.

THE WITNESS: Robert E. Bedworth.

94 MR. McMAHON: Addressing myself to GC 11, the property of Brace-Mueller-Huntley, Inc., Mr. Bedworth—

THE WITNESS: Yes, that is correct.

MR. McMAHON: Mr. Bedworth, this is a boundary line map?

THE WITNESS: That is correct, um huh.

MR. McMAHON: And it reveals that it was done by Holmes, O'Brien & Gere on October 23rd, 1945?

THE WITNESS: That is correct, um huh.

MR. McMAHON: And it shows by solid broken line along the northerly border the south line of the Defense Plant Corporation, does it not?

THE WITNESS: That is correct.

MR. McMAHON: Now, is there a survey which you made, or are there documents which you have that you as a surveyor can testify to which show us not where the north line of the Brace-Mueller-Huntley is, but where the south line of the Carrier Corporation is? By a boundary line map rather than a topographical map?

THE WITNESS: I have seen a boundary map which they made made by Ensign Cottral.

MR. McMAHON: There are boundary line maps then?

THE WITNESS: I am quite sure. I didn't, but it was made by Ensign Cottral, and I am quite sure it is a certified survey. I would have to look at it, it is in the room here.

MR. McMAHON: When people transfer real property in and about the county of Onondaga, let's just take an ordinary home or a land or a parcel of property—

THE WITNESS: Yes.

MR. McMAHON: Have you or the firm you work for been asked to make surveys?

THE WITNESS: Oh, yes, yes.

MR. McMAHON: And this is what we call a boundary line survey?

THE WITNESS: Yes.

MR. McMAHON: And if you told me, and as I understand it, that you go to the Abstract or the search, as we commonly call it, and pick out the monuments or markers, or whatever reference point that you have and then you make that survey?

THE WITNESS: Um huh.

MR. McMAHON: And then you stand on your professional reputation that that is a true and correct representation of what you find?

96 **THE WITNESS:** Yes, um huh.

MR. McMAHON: And in so far as Brace-Mueller-Huntley, Incorporated, if they were going to transfer this property today, based on your experience in the Town of Onondaga, the County of Onondaga, State of New York, is it likely that they would ask for a licensed survey?

MR. NAIMARK: I object. I don't see how he could testify to what Brace-Mueller-Huntley would ask for.

MR. McMAHON: Based on his survey.

TRIAL EXAMINER MAHER: Overruled.

MR. McMAHON: If they were to transfer title to this property outlined on this map, would they have a redated survey?

THE WITNESS: In all probability they would, or the buyer would.

MR. McMAHON: The buyer would or the seller would produce for him a recent, redated survey, and I not correct?

THE WITNESS: In general, yes. I mean sometimes it doesn't happen, of course.

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98 **MR. McMAHON:** All I want—I would particularly like to have, and perhaps I will draw my remark fine, we have a licensed surveyor here, and the appropriate maps he made or rechecked, with the questions which you simply elicited the answers from, we can tell, or our main problem is: Who owns that land on which those railroad tracks lie? Does the New York Central own them, or do they merely have an easement?

MR. NAIMARK: I submit we are going to produce proof of ownership.

We are now concerned with the question of location of the property, that is what the problem is.

MR. McMAHON: Well, I would like to reserve my objections to this document. Apparently, as you indicated, you are going to be very liberal and permit him to connect this line of questioning, and I would like to save my objections and make them all at one time.

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118 **HARRY A. WIEDEMAN,** a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER MAHER: Please be seated
119 and give your name and address to the reporter.

THE WITNESS: My name is Harry A. Wiedeman,

Real Estate Agent of the New York Central Railroad Company, 910 Erie Boulevard East, Syracuse, New York.

DIRECT EXAMINATION

Q. (By Mr. Naimark) Mr. Wiedeman, what is your position?

A. Real Estate Agent.

Q. And who do you work for?

A. The New York Central Railroad Company.

Q. And precisely what are your duties?

A. I am responsible for the real estate functions of the Railroad Company within the Syracuse territory.

Q. And in connection with the operations of the New York Central, do they operate and maintain railroad tracks at property on Thompson Road?

A. Yes, sir.

Q. And is that adjacent to the Carrier Plant?

A. Yes, sir, it is.

Q. Can you describe where the tracks run from on the westerly side of Thompson Road, and where they go to?

A. Generally, I can. The track comes off our so-called Junction Branch and curves around leading across Thompson Road in an easterly direction which comes in on the southerly side of the Carrier property, of the Carrier plant, excuse me.

MR. NAIMARK: Mark this as General Counsel's Exhibit. 12

120 (Thereupon the document hereinafter referred to was marked General Counsel's Exhibit No. 12 for identification.)

Q. I show you what has been marked GC 12, and ask you if you can tell me from a chart, from that chart, where the railroad crosses, where it starts from, as you started testifying, and where it crosses, where it crosses to?

MR. McMAHON: I object to the question at this time since he is testifying from what has now been identified as GC 12, and unless, as it stands right now, this bears the notation that H. G. Throop, C.E., I am looking at the center under the legend, is a Civil Engineer, who presumably made this survey, and until such time as we have testimony from the man who actually made the survey, the same matters we have gone over before, I think it is improper to testify from this document on the assumption of its being correct.

MR. NAIMARK: It is not being offered for this purpose. It is offered for this purpose. It is offered as a chart and we can, with the testimony of the witness, can identify the particular railroad crossing, and so forth. It is not being offered as a survey or to prove ownership, but merely as a chart in connection with this testimony.

MR. McMAHON: The document is improper. I think I have been very liberal, but now it bears notations on the land sold to the New York Central May 19, 1949, the section east of Thompson Road.

121 It is one thing for us to say that it is being offered for one purpose—As I say, I have been very liberal on that subject, and I have gone as far as I intend to go, and I feel that it is improper at this time. There is no foundation for testimony upon this document. There is no foundation for the admission of this document. But I was going to say, of course, you have control of your own proof, and if someone was going to come in and testify to its authen-

ticity and correctness and accuracy, I certainly abide by such a ruling. In the absence of that promise I submit that any testimony related to this document can only be used for the purpose of refreshing his recollection and there is no necessity for refreshing his recollection as to where the railroad tracks are located.

MR. NAIMARK: Well, all I have to say, I understand, Mr. Examiner, that any chart or map the witness may use, any such document or chart in connection with his oral testimony. I am not offering the document to establish the ownership or the location, but I am merely going to ask some questions with reference to the location or the description, I should say, of the property.

MR. McMAHON: This is an exercise in semantics that I don't mean to pursue so late in the afternoon, and I don't mean to have to remark to you in any sharp sense the difference between a description and a boundary line and a limit is a distinction about a difference as far as I am concerned. I think it is improper and without foundation to have a witness testify from a document as to the location of railroad tracks as it obviously has a much broader purpose than this. I know of no Federal or State rule of evidence which permits it and indeed, I know several State rules of evidence which prohibit proceeding in this fashion.

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124 MR. McMAHON: It is unnecessary, it seems to me.

It is unnecessary to encumber the record to say what these things say. They obviously speak for themselves. The point is that if Counsel for the General Counsel merely showed the direction and course of the railroad tracks, we have already had that set out in Government Exhibit No. 9, which is the plot plan of Carrier, so that this seems

to me to be burdensome, repetitive, unnecessary. If now we are going to go into this question of metes and courses and bounds and boundary markers, then I object to it because all we are now showing is that Government Exhibit No. 12 is a microfilm copy of a map kept in the New York Central Railroad office, and that this is accurate transcription of it, but if we are now going back to the other question of about who owns title to this land, I submit that Mr. Wiedeman is not the proper person to testify as to the authenticity of these documents.

MR. NAIMARK: I am not trying to establish ownership, but trying to establish the various jogs and the various spur tracks on the property so it will be clear for the record.

The question of ownership will be established with the deed plus the other information we expect to bring in later.

TRIAL EXAMINER MAHER: I understand that what you are trying to establish is other property purported to be owned by the railroad?

MR. NAIMARK: Yes.

TRIAL EXAMINER MAHER: Without going into the actual proof of title?

MR. NAIMARK: That is right.

TRIAL EXAMINER MAHER: For that purpose I will permit the continuation of the examination in this line.

127 Q. (By Mr. Naimark) Mr. Wiedeman, is there a gate that leads into the property where the railroad tracks enter the property? I show you GC 12.

A. There is a gate on the easterly side of Thompson Road where our tracks lead into our property.

Q. And who keeps the key to this gate?

A. I do not know, sir.

Q. Are you familiar with who uses this property? In other words, what employees?

A. The New York Central Railroad employees would use this property to bring trains into the property.

Q. I show you what has been marked for identification as GC 8, and ask you to refer specifically to page 3 where it says Parcel 3.

A. Yes, sir.

Q. And does the description of Parcel No. 3 coincide with the description of the metes and bounds, on GC No. 12?

MR. McMAHON: Mr. Hearing Officer, are you instructing the witness not to answer so I can articulate my objection?

We are now back at the point that I apparently was—I was overruled on, and I just wonder whether or not the Trial Examiner was beguiled.

128 We are now using government Exhibit No. 11 for the very purpose we were assured it was not going to be used for, to be correlated with Government's Exhibit No. 8.

TRIAL EXAMINER MAHER: The only way you can tell if the Trial Examiner was beguiled, Mr. McMahon, is to object to it.

MR. McMAHON: I object to it as improper, without proper foundation, that Mr. Wiedeman has not been shown to be a land surveyor and at all familiar with the accuracy

or technique or any of the details which are shown on Government Exhibit No. 12, and for that reason I feel that any questions in correlating, in attempting to correlate the detail shown on Exhibit No. 12 with Government's Exhibit No. 8 is improper and without proper foundation, and I ask a favorable ruling.

TRIAL EXAMINER MAHER: General Counsel's Exhibit No. 12?

MR. McMAHON: General Counsel's Exhibit, yes.

TRIAL EXAMINER MAHER: Was admitted for the specific purpose of identifying and locating the New York Central facilities in and about the southerly boundary of the Carrier properties and for no other purpose. That was the representation made at the time it was offered, and that is the basis upon which it was accepted.

The questioning that Mr. Naimark has made with reference to this exhibit now extends beyond the original purpose of the offer, and acceptance of this exhibit, as counsel has just indicated. It is incumbent upon counsel 129 sel for General Counsel, therefore, to at the appropriate time request that this document be admitted for other purposes than those originally sought, and at that time the questions either will or will not be relevant, depending upon my ruling at that time, and I will suspend and reserve ruling on the objection subject to tying in with any further offer in this respect.

MR. McMAHON: Well, lest it slip my mind, my position is and will be that unless either Mr. Throop or someone who says that he went out as the last witness did, and said that he checked what Mr. Throop did, I am assuming that the symbol "C.E." on General Counsel's Exhibit 12 means Civil Engineer, and unless and until we get either

Mr. Throop or—Unless we get Mr. Throop, either now or at some later time, on that Government's Exhibit, on General Counsel's Exhibit No. 12, it can serve no other purpose than that for which it was originally accepted, and I accept, of course, the trial examiner's right to control the order of the proof, but I want my position to be clear on the record now and later.

TRIAL EXAMINER MAHER: I think your objection is premature because I don't believe the offer was made for any further purposes, but we are relating it forward when the time comes, and we will consider your argument as having been made.

MR. McMAHON: Thank you.

TRIAL EXAMINER MAHER: Off the record.

130 (Discussion off the record.)

TRIAL EXAMINER MAHER: We are on the record.

Take it away, Mr. Naimark.

MR. NAIMARK: I think I asked him a question that is pending, and I think there was an objection. Now maybe I am wrong.

TRIAL EXAMINER MAHER: There was an objection and maybe some colloquy on it.

Q. (By Mr. Naimark). My question, as I recall it, was whether or not this conforms to the language in the deed, the descriptive language conforms to the plot or layout of the map G. C. 12?

A. May I have a minute to prepare, please?

Q. Yes.

TRIAL EXAMINER MAHER: Off the record.
(Discussion off the record.)

TRIAL EXAMINER MAHER: On the record.

A. I am prepared to answer it.

TRIAL EXAMINER MAHER: All right.

A. Parcel No. 3 on this document generally conforms with the land shown on this map.

MR. McMAHON: You say generally?

MR. NAIMARK: Are you questioning?

MR. McMAHON: I didn't hear it.

MR. NAIMARK: Sorry.

MR. McMAHON: Did you put the word "generally" in it?

131 THE WITNESS: Yes, sir, I did.

Q. (By Mr. Naimark): Do you know whether New York Central has ever reconveyed the land which is known as Parcel 3 on General Counsel's Exhibit No. 8?

A. No, it has not.

MR. NAIMARK: At this time I offer in evidence G. C. 8 which is the certified copy of the deed which you have referred to and particularly with reference to Parcel 3.

MR. McMAHON: In so far as the deed itself is concerned, I have conceded that that is all right. I submit that it still lacks a proper foundation; that it goes on and describes something, and I will go further to abandon the confusion that if the General Counsel brought in the person who made what is now styled General Counsel's Exhibit 12, and correlated it, we would have this matter, but

I say that General Counsel's Exhibit No. 12 has been issued for a very limited purpose only.

TRIAL EXAMINER MAHER: That is right.

MR. McMAHON: And until such time as it now can serve its broader, more fundamental purpose, I believe we will require the testimony of Mr. Throop or someone who knows and works under his control.

TRIAL EXAMINER MAHER: On that point we have still not gotten to the point of considering, or enlarging the purpose of General Counsel's Exhibit No. 12, so 132 that your argument on that point is premature, and I will consider it at the time. But directing my attention to the offer of General Counsel's Exhibit 8, being the deed, it is over, I won't say Counsel's objection, but Counsel's remarks put into evidence. You still have Mr. McMahon's outstanding comments on the uses to which you may put G. C. 12.

(The document heretofore marked General Counsel's Exhibit No. 8 for identification, was received in evidence.)

MR. McMAHON: I stated, I hope, that G. C. 12 is prejudicial. I didn't want to admit it for any purpose.

TRIAL EXAMINER MAHER: You had stated.

MR. McMAHON: Now it is accepted for a limited purpose and I maintain it should be confined to that purpose.

TRIAL EXAMINER MAHER: That is right.

MR. McMAHON: But now it is being used as the real plot for Government's Exhibit No. 8 to show the relevance, and this is the only reason I now rehash, that has been rehashed so often—

TRIAL EXAMINER MAHER: In case he tries to put it in for other purposes, you object.

MR. NAIMARK: No other questions of this witness.

MR. McMAHON: No questions, that is all.

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136 **TRIAL EXAMINER MAHER:** Please raise your right hand.

JOHN J. BOWES, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

THE WITNESS: John J. Bowes, 910 Erie Boulevard, Syracuse, New York.

DIRECT EXAMINATION

Q. (By Mr. Naimark) Mr. Bowes, you are employed by the New York Central Railroad, are you?

A. Yes.

Q. And what is your position?

A. Trainmaster.

Q. And how long have you been employed by the railroad?

A. Twenty-two years.

Q. And generally speaking, what do you do as trainmaster?

A. In charge of all the train operation over a specific territory.

Q. Directing your attention to Thompson Road adjacent to the Carrier plant, do you have anything to do with the operation of the railroad at that junction?

A. I do, all train operations.

137 Q. And does your train cross Thompson Road at the particular area I mentioned.

A. That is correct.

Q. Would you take a look at General Counsel's Exhibit 2, and tell me if that is the particular area which your railroad services at Thompson Road?

A. I would say that looks like it, yes.

Q. And would you briefly describe the manner or method? Will you briefly describe the particular direction of the train and how it crosses Thompson Road, where it comes from and where it goes to?

A. To get into the Carrier plant which is located on Thompson Road, the New York Central train travels over a portion of the New York Central Railroad which is commonly referred to as the Lake Line, L-a-k-e Line portion of the New York Central Railroad which extends from DeWitt in East Syracuse, approximately seven and one-half miles to Syracuse Junction. It is a spur which runs off the northerly side of this main track which serves several industries, including the Carrier plant. And in order to get to the Carrier plant the railroad train must proceed in an easterly direction over Thompson Road and enter a gate which I believe has been marked for evidence

as Gate No. 1 in previous testimony. That is railroad property—

MR. McMAHON: I object to that as calling for a 138 legal conclusion.

TRIAL EXAMINER MAHER: Sustained.

MR. McMAHON: I move to have it stricken.

TRIAL EXAMINER MAHER: Sustained. Granted.

A. They enter that gate which is owned by the railroad, is owned by the, the property is owned by the railroad—

MR. McMAHON: I object to that, Mr. Bowes. I am sure that this is a very technical point.

A. I appreciate your objection, Mr. McMahon—

TRIAL EXAMINER MAHER: We will have have no conversation between Counsel and the witness. It is addressed to me.

MR. McMAHON: I move that the comment of Mr. Powes that this is railroad property at least once we get inside the gate, be stricken.

TRIAL EXAMINER MAHER: Your motion is granted. The motion calls for a conclusion of the witness that he has not yet been qualified on the record to make.

THE WITNESS: Well, Mr. Maher, I believe I am qualified, if I might respectfully state.

TRIAL EXAMINER MAHER: I think, Mr. Witness, if you will pardon me, that calls for a legal term which must be brought out on the record. If you are qualified, I am sure the Counsel who is questioning you will establish your qualifications to make such qualifications on the record.

THE WITNESS: I shall state that the New York Central Railroad train, in order to service the Carrier 139 plant must cross Thompson Road on rails owned by the New York Central Railroad and proceed through the gate on rails owned by the New York Central Railroad, and service the Brace-Mueller-Huntley plant, the Western Electric and the G.E. and the Carrier plant.

Q. (By Mr. Naimark) Are you familiar with how wide the Thompson Road is at that junction, Mr. Bowes?

A. Would you repeat that question, please?

Q. How wide is Thompson Road at this particular crossing?

A. Approximately, I would say, probably 35 feet.

Q. And is it an areaway from the gate to Thompson Road?

A. It is.

Q. And do the tracks extent, the tracks extend across that areaway?

A. That is correct.

Q. By what authority does the railroad cross Thompson Road at this point?

A. Under the New York State Highway Law 130.

MR. McMAHON: I object to that as calling for a conclusion.

TRIAL EXAMINER MAHER: If you know.

MR. McMAHON: If he knows, he can answer.

TRIAL EXAMINER MAHER: The objection is overruled. I understand your point.

A. The New York Central Railroad crosses at 140 Thompson Road which formerly was a County Road under the New York State Permit No. 130 issued by the Highway Department of the State of New York.

Q. (By Mr. Naimark) Now, in crossing Thompson Road from the west portion of Thompson Road, is there a particular area that it starts from, located in back, is there a plant or a point of origin?

A. Approximately six, oh, I would say six thousand feet in a westerly direction is where this spur runs off our main line which I referred to in previous testimony as being the New York Central lake line.

Q. And what is the normal procedure, what is the method of operation of this train when it starts from this 6,000 feet, was it, you say, until the time that it crosses Thompson Road servicing these plants?

A. The normal procedure is for the train personnel to stop and flag cars across Thompson Road, and they are in the possession of a key which opens the lock which fastens the gate entering the Carrier plant, the Brace-Mueller-Huntley plant, Western Electric, and G. E. That is the normal procedure.

The gate is not operated by Carrier personnel. The New York Central personnel is furnished a key for the security protection of Carrier Corporation for that line.

Q. And how frequent are these trips that the train makes in servicing these companies?

141 A. Daily, six days a week, Monday through Saturday.

Q. Once the train is through the gate, Mr. Bowes, how

does it get to these various other plants you have mentioned, Brace-Mueller-Huntley, Western Electric—

A. By traveling over a main lead or ladder which services those various consignees.

Q. And if you know, by what authority does it do so?

A. They do so under the authority that they are traveling on their own railroad.

Q. I mean, are there any particular agreements made with these other companies?

A. The General Railroad Act affecting all railroads in New York State, of 1850, gives them the right to go in there. As a matter of fact, they are compelled upon notification of a desire by a concern to ship freight or to provide them with service, and failure to do so they are subject to fine by the courts.

MR. McMAHON: I move to—

MR. NAIMARK: I consent that the last phrase may be stricken

Q. (By Mr. Naimark) I show you what has been marked as G.C. 9, Mr. Bowes, kind of long and large, and I ask you to look at that map and can you tell me, is there a warehouse belonging to Carrier noticed thereon?

A. Yes. You are referring to a warehouse, correct?

142 Q. Yes. You say your railroad proceeds through a gate. Now, I want to know is there a warehouse?

A. There is a warehouse and I believe the particular warehouse that you are referring to is TR 19 which is served by the New York Central Railroad and has a spur track going to and entering the building, and in order

to get to that TR 19 warehouse one must proceed over Thompson Road.

Q. Are there switches used in connection with the operation of the New York Central Railroad in servicing these various companies?

A. Yes.

Q. And where are these switches located?

A. Those switches are located on our main track which is east of Thompson Road.

Q. Who services and maintains their switches?

A. The various consignees have a private side track agreement. They service their own track.

Q. Do any employees other than the New York Central employees go through this gate?

A. No, they do not.

Q. Are the employees of the New York Central represented by either of the respondent Unions in this matter?

A. No, they are not.

Q. Now, directing your attention to March 11, 1960, did your railroad have occasion to enter this gate at 143 Thompson Road and perform services for Carrier Corporation?

A. They did.

Q. And specifically did this involve the hauling of the 14 cars?

A. Yes.

Q. When were arrangements made for this?

A. Arrangements were made for that on March 10.

Q. Can you be a little more specific and tell me what arrangements were made prior to March 11?

A. Well, on March 10, representatives of the Carrier concern notified the management of the New York Central Railroad that they desired to switch out of their warehouse TR 19 14 cars; consequently there was a meeting held with the various crafts representing the engineers, the firemen, the conductors, and trainmen's organization of the railroad personnel in my office, at which time it was explained to them on the 10th that the Carrier plant was going to be switched on the 11th. We were aware of the fact that between March 2nd and up to and including March 10 the regular train personnel had been daily going in through this gate at Thompson Road for the purpose of switching out Brace-Mueller and Huntley, Western Electric and G.E.

I might also add that the train personnel also switched out coal for Carrier. Now, the reason why the coal was switched out for Carrier was because it so happened 144 that G.E. is a tenant to Carrier in respect to coal, therefore the various crafts representing the railroad were not opposed to switching out the coal. They were permitted to do so.

During the time from March 2nd through the 10th—

TRIAL EXAMINER MAHER: Permitted to do so, permitted by whom?

THE WITNESS: By the pickets. During the time between March 2nd and the 10th daily when the railroad personnel attempted to go in through the gate, they were stopped by representatives of the pickets—

MR. McMAHON: I object to this unless there is a

foundation that Mr. Bowes can say he was there and he saw what he says and heard what he thinks, and he is telling us his understanding. I object to this portion of the narrative, and ask that it be stricken.

MR. NAIMARK: I will consent.

Q. (By Mr. Naimark) Are you referring to March 3 at the railroad gate?

A. At the railroad gate, and to clarify this issue for Mr. McMahon to the extent that I was there—

MR. McMAHON: On March 11th?

THE WITNESS: Prior to March 11th, Mr. McMahon, I was there.

MR. McMAHON: If you have testimony it is altogether proper—At this point we don't have a proper foundation, and I submit it should be stricken at this time.

TRIAL EXAMINER MAHER: The objection is overruled. The witness testified he was present.

MR. McMAHON: Where? I submit I am entitled to know, to conduct a proper cross examination as to when and where and who said what to whom.

TRIAL EXAMINER MAHER: You feel free to do so on cross examination.

MR. McMAHON: I submit it is improper in this fashion.

TRIAL EXAMINER MAHER: Counsel, I have ruled.

MR. McMAHON: I realize you have ruled. I don't want to prolong the matter—

TRIAL EXAMINER MAHER: We are off the record.

(Discussion off the record.)

TRIAL EXAMINER MAHER: We are on the record.

Q. (By Mr. Naimark) Do you want—

A. Between the time of March 2nd and March 10 I was on the engine one day when the regular train personnel made their daily trip to this particular gate, and I overheard a representative standing on the ground of the—

MR. McMAHON: I object, your Honor, as to stating that somebody was a representative. Now—

Q. (By Mr. Naimark) Do you know who it was, sir?

A. No, all I know is he had—

MR. McMAHON: I renew my objection.

146 **TRIAL EXAMINER MAHER:** Overruled.

A. All I know, he had a Union button on him, and I had every reason to believe he was truly identified.

MR. McMAHON: I submit the answer is conclusionary, it is an opinion not based on substantial fact.

TRIAL EXAMINER MAHER: The objection is noted on the record.

Q. (By Mr. Naimark) Go ahead, Mr. Bowes.

A. And this individual standing on the ground asked the conductor of the train what they proposed to do. He assured them they were going to switch out the Brace-Mueller, the Western Electric, the G.E., and the Carrier coal. He was told to stay to the right and not go to the left.

Q. What is to the left, Mr. Bowes?

A. The left would be Carrier. Now, I personally heard that.

Q. Well, all right—

A. Myself.

Q. That is enough.

A. That is not hearsay information. I wish it to go into the record as such.

Q. Just answer the questions, Mr. Bowes.

On March 11th did you arrive at this particular gate at Thompson Road we refer to?

A. Yes.

Q. And what time did you arrive, approximately?

147 A. I arrived there at 12:30.

Q. And will you tell us what you observed when you arrived?

A. The New York Central engine was standing just west of Thompson Road, and there were twenty to thirty pickets directly in front of the engine.

I identified myself to one of their spokesmen, and asked him what the trouble was.

He informed me that there were two open-top gondola cars standing on our main track inside this particular gate that we have been discussing, and they were fearful that the train personnel was going to move them out of Carrier.

I might add that those two cars were placed there during the previous 24 hours by a trackmobile of the Carrier Corporation which is used for that purpose.

Q. Were these Carrier cars or gondolas?

A. They were gondola cars loaded with Carrier property and so identified.

Q. All right.

A. I assured the gentleman that the train personnel were present to serve the plants as they had during the period of March 2nd through the 12th, and requested that they permit the engine to proceed with the normal duties. The train personnel was permitted to cross Thompson Road and enter through the gate without any incident.

Q. Then did they come back after that? Did they 148 come out again?

A. After having served the Brace-Mueller and Huntley, G.E. and Western Electric, in addition to switching out the coal pile, they did return. And at a point back of the Acme plant, which is approximately 3,000 feet to the west of Thompson Road, railroad supervision took over the engine, and with 14 empty box cars, which were desired by Carrier, proceed back on Thompson Road and into Carrier and switches out the so-called TB 19:

Q. Just a minute, Mr. Bowes. You said that on the west to east portion of Thompson Road and 3,000 feet in back is the Acme plant?

A. That is correct.

Q. You say there were 14 cars there, waiting there?

A. That is correct.

Q. And when did those 14 cars get placed there?

A. Those 14 cars were brought over by the regular train personnel.

Q. And when was this?

A. The morning—the—

Q. The morning of March 11?

A. That is correct.

TRIAL EXAMINER MAHER: Acme plant. Is that the property located on that project map as American Stores?

THE WITNESS: That is correct, Mr. Examiner.

149 Q. (By Mr. Naimark) What was the object or purpose in regard to these 14 cars? What was to be done with those?

A. Carrier had expressed the desire to take out 14 loaded cars that were in the TR 19 warehouse, and to set in 14 empty cars because they claim that they had approximately 200 cars of raw material that they wanted to ship out and had previously requested on each day that a switch was made to the plant that fourteen empty cars be sent back in the plant.

Q. Now, then, as I understand it, these 14 cars on the train were then manned by, did you say, supervisory personnel?

A. That is correct.

Q. What happened when the train with the supervisory personnel got to Thompson Road?

A. When the supervisory force got to Thompson Road they encountered a considerable amount of difficulty in getting over Thompson Road.

Q. What sort?

A. Due to the fact that the pickets were determined not to let the supervision with the engine and the 14 cars cross Thompson Road to go back into the warehouse, and it was a case of inching our way across Thompson Road, forcing pickets physically to get off the railroad right-of-way and permit the entry of the engine and the 14 cars.

TRIAL EXAMINER MAHER: Can I interrupt to 150 ask a question? Was this difficulty encountered on the east or west? It was first encountered on the east or west side of Thompson Road?

THE WITNESS: The difficulty, Mr. Examiner, was encountered right at the outset on the westerly side of Thompson Road.

TRIAL EXAMINER MAHER: That is across the road from Carrier?

THE WITNESS: That is correct, sir. And then it proceeded as we went, inch by inch, across Thompson Road, right up to the gate and through the assistance—

TRIAL EXAMINER MAHER: When you refer to people being on the right-of-way at that point, without getting into questions of title of property, would it be correct to say, is it correct to say that if the men were on the west side of Thompson Road, allegedly impeding the progress of the train, that they were on your right-of-way, or on the public highway over which your railroad was crossing?

THE WITNESS: At the outset they were on our right-of-way, then as we progressed they would be on the public highway, and they after we got over the public highway they would be on what has been referred to as our right-of-way up to a point of the gate.

TRIAL EXAMINER MAHER: I want to get the proper directions.

Q. (By Mr. Naimark) Let me stop you a minute, 151 Mr. Bowes. When the pickets were on the westerly portion of Thompson Road that you just referred to, did you see any identification signs with respect to the Steelworkers Union?

A. Some of them or maybe all of them, but some of them I observed had buttons on them. What the buttons said, I don't know.

Q. Can you describe the button?

A. No. My attention was focused on the engine and in trying to get the engine safely across without injury to anybody.

Q. Were there any signs as far as banners or placards?

A. There was a placard in the snow bank on the easterly side of Thompson Road, but what it said, I don't recall.

Q. All right. Now, when the train crossed the easterly section of Thompson Road, what happened then?

A. Well, it was necessary to cross Thompson Road the first time, and this is with railroad supervision, with 14 empty box cars, and those 14 empty box cars were set on the main just inside the gate, and the engine proceeded into this so-called TR 19 warehouse, and they picked up 14 box cars, and they came out and they parked those 14 box cars on the turn-around track alongside of the 14 empty box cars; and then in order to get back on the west end of the runaround of the 14 empty box cars, it was necessary to throw a switch and clear a switch, and in order to clear that switch we had to come out on Thompson Road again, approximately one-quarter of the way on the 152 easterly side of Thompson Road, at which time we once again encountered difficulty in getting the engine out on the road.

Q. Let me stop you a minute. When did you make the switch inside, as I understand you, to make the 14 empty, 14 empties to the warehouse, do you—

A. No, Mr. Counsel, first we drop the 14 empties inside the gate.

Q. Where did you put these 14 empties?

A. Just inside the gate to clear the runaround switch.

Q. I see.

A. Then we go into a warehouse and bring out the loads, we have to get the loads in before the empties go in.

Q. I see. And then the empties go in after?

A. The loads come out.

Q. And when you made the hookup of the 14 cars that come out, is that why it is necessary for the engine to move outside the gate?

A. Once again for the third time the engine would come out on Thompson Road in order to go back where the loaded cars are, get them out, so there were two complete moves over Thompson Road, and two moves that went over half of Thompson Road.

Q. I show you what has been marked for identification and in evidence as General Counsel's Exhibit 7, and 153 ask you if that is a replica of the train coming out from the inside of the gate going west, and is that it coming out, for the purpose which you described, or is that coming out with all the cars?

A. That is a picture which represents the last move of the railroad when she came out with 16 cars.

May I clarify the 16 cars? As the 14 box cars in warehouse TR 19 plus the two empties, or plus the two loaded open top gondolas I previously testified to.

Q. And you identified that in picture GC 71

A. Yes.

Q. Is that you on the train?

A. Yes.

Q. Depicting the individual on the left, farthest left on the platform, is that you?

A. That is correct.

Q. Now, when you came out this time did you recognize any of the individuals who were present there—at the time that the train came outside the gate?

A. Yes.

Q. Who did you recognize, who did you know?

A. Mr. John Kowalski was approximately a foot and a half away from the front draw end of the engine.

Q. And anybody else?

A. A gentleman by the name, I believe is Housick; also a gentleman by the name of Lyons.

154 Q. Is that Hosid?

A. Hosid, I beg your pardon.

Q. How about Frank Brewster, was he there?

A. Yes.

MR. McMAHON: I object to that as leading.

MR. NAIMARK: What is leading about it? I asked if Frank Brewster was there?

MR. McMAHON: The form is leading, and I object to it.

TRIAL EXAMINER MAHER: Overruled.

Q. (By Mr. Naimark) Would you describe what hap-

pened as the train first came out of the gate to make its final crossing with 16 cars?

A. Well, during the time of the return move, and the fourth move, which was the final move over Thompson Road, an automobile driven by Mr. Kowalski proceeded north—

MR. McMAHON: I object at this point. This is again just the sort of thing to which I spoke about before as being unfair. Now, he said that an automobile was driven by somebody. In all fairness, I think we are entitled to know who he saw, what he was doing, and what happened.

TRIAL EXAMINER MAHER: Isn't that what he testified to?

MR. McMAHON: No, it isn't. I object to that answer as improper.

TRIAL EXAMINER MAHER: Would you repeat your answer?

155 (Answer read.)

TRIAL EXAMINER MAHER: I have no reason not to believe that this witness is not testifying to what he saw, and he hasn't testified otherwise.

Your objection is overruled.

A. That car stopped directly over our tracks at Thompson Road and stood there until our engine was brought within two or three inches of the car itself, at which time it was finally moved off the track by deputies.

During the time it was on the track, and during the time that the engine was trying to proceed over the track,

pickets were milling around the engine and preventing it from making a safe passage over Thompson Road.

Q. (By Mr. Naimark) When you say "proceeding", what were they doing, Mr. Bowes?

A. They were standing on the leading foot board of the engine. They were falling down on the track, either deliberately, or otherwise, but certainly after being down on the ground they had to be forcibly removed from the track by deputies. They were calling names to people on the engine. They were making threats.

MR. McMAHON: I object to that characterization. What was said to whom and by whom?

THE WITNESS: They were making challenges.

MR. NAIMARK: That is not—

156 MR. McMAHON: May I have a ruling on my objection, first?

TRIAL EXAMINER MAHER: You have the ruling by my informing you that you will have ample opportunity to cross examine. Your objection is overruled.

A. A gentleman by the name of Hosid personally challenged me to get off the engine for the purpose of getting my block knocked off. The same individuals were calling names to personnel on the engine.

Q. (By Mr. Naimark) Did Mr. Kowalski say anything to you?

A. Mr. Kowalski did not speak.

Q. Was he there?

A. He was present

Q. Was Frank Brewster there?

A. He was present.

Q. Did you hear anything said by either Mr. Brewster or Mr. Kowalski to either you or the pickets?

A. No, I did not.

Q. Then will you tell us what happened after that?

A. After we eventually got over on our fourth and final move, we proceeded west across the Thompson Road with the 16 cars as mentioned previously, and we found that three rail lengths of the main line track had been greased on both the north rail and the south rail, and that the switch entering the Acme plant had been thrown into reverse movement and calked, and I might explain that 157 terminology. That is railroad terminology, and when you calk a switch and reverse it, you can very easily derail a train if a reverse movement is made over same.

Q. Well, Mr. Bowes, do you know who did this?

A. No, I do not, I have no knowledge of who did it.

Q. When the crossings were made originally, who opened the gate?

A. I opened the gate on the original move to let the train personnel into the property.

Q. And who closed the gate when you finally came out?

A. When we finally came out I have no knowledge of who closed the gate.

TRIAL EXAMINER MAHER: Does the lock on the gate require a key to close and lock it?

THE WITNESS: No, it does not, Mr. Examiner.

TRIAL EXAMINER MAHER: Is it a padlock?

THE WITNESS: It is a padlock, yes.

MR. NAIMARK: I have no further questions.

TRIAL EXAMINER MAHER: Mr. McMahon?

CROSS EXAMINATION

Q. (By Mr. McMahon) I show you General Counsel's Exhibit 2, Mr. Bowes, and I ask you if you know who owns that fence that goes across the track?

A. The Carrier Corporation owns that fence, Mr. McMahon.

161 **Q.** Do you recall, Mr. Bowes, testifying in this court before Judge Brennan on the 8th day of April, 1960?

A. Yes.

Q. And you were under oath?

A. That is correct.

162 **Q.** And the answers you gave were the truth?

A. Absolutely.

Q. You recall being asked this question and giving this answer: "Question."—This is me questioning. "In other words, these events of March 11 didn't just come out of the blue, you knew on March 9th that there was going to be some kind of delay?

Answer: That is correct.

Question. Would you restate that for us?

A. I was aware on March 9 the Carrier people had made their first request upon the New York Central Railroad to provide them with a switch. This is the

first request that the Carrier people had asked for and a meeting to request that switch was held on the New York Central property on the morning of March 10."

A. That is correct.

Q. That is all I want to know. Had you met with the railroad personnel on March 10th?

A. Railroad personnel and Carrier personnel met on March 10th.

Q. And then you met with the operating employees of the railroad, did you not?

A. On the evening of March 10th, correct.

Q. What was the reason for discussing this matter with railroad personnel?

A. Well, we felt we should appraise the various 163 crafts of the railroad what precisely was proposed upon March 11th. We did not feel that the organizations should be kept in the dark.

Q. Again directing your attention to your prior meeting herein this court room before Judge Brennan: "Q. And then what happened? I mean you were at this meeting on March 10th and they wanted you to move them out in lots of 14?"

You answered: "I felt that the matter should be discussed with our various railroad crafts to perhaps see what their intentions were. I had my suspicion from previous experience in cases such as this that the railroad crafts would not cross the picket lines, and therefore I called them into my office and had a meeting with the various crafts on the evening of March 9th where I appraised them of the desire of Carrier, and I told them that man-

agement felt they would have to service Carrier"—Strike that "And I told them that management felt that if they would not go to service Carrier, then we would, with management personnel, service Carrier."

Now, do you recall giving that testimony?

A. I recall giving that testimony, Mr. McMahon.

Q. And was it true?

A. But I definitely am going to take issue with that date of March 9th, because on the date of March 9th there was no meeting. The only conversation I had on March 9th 164 relative to a possible proposed switch by Carrier was a telephone call that came to my residence at approximately 9:00 P.M. by my superior, and it requested that I be in the General Manager's office of the New York Central at 9:00 o'clock on the morning of March 10th to propose what we believed to be a request for a switch by Carrier. So that actually the first formal notification that we had from any representatives of Carrier was discussed in the General Manager's office on the morning of March 10th. And then it was on the evening of March 10th that I met the chairman of the various railroad crafts, and definitely not on March 9th.

Q. So is the rest of that statement true?

A. Yes, it is, Mr. McMahon.

Q. But you take exception to the March 9th?

A. That is correct. I am going to have to take exception to March 9th. If that says March 9th, it is either a misunderstanding or what have you.

Q. All right. It is true that you had prior experience

with railroad crafts not wanting to cross picket lines going to struck plants?

A. Yes. I knew that my railroad crafts would definitely respect picket lines.

Q. And then there came, at this meeting, I read from here, continuing from your answer on April 8th, "Now, we could have taken an engine right out of East Syra-165 cuse, the DeWitt yard, and gotten through to the Carrier plant, a distance of two miles, approximately. Now, if management did that, we would be in violation of the contract.

Q. With the Railroad Brotherhood?

A. That is correct."

Q. Is that true, then?

A. That is true then and is now.

Q. And it is now?

A. Yes, sir.

Q. And you continue with your answer "So that for that reason we felt we would have to organize the railroad, bring the cars to a point in close proximity to Thompson Road at which time management would take over, and that is precisely what we did on the day in question."

A. That is correct.

Q. And that is true then, and it is true now?

A. Absolutely so.

Q. And now there was some question about two open top gondola cars, and you say that they had been moved

by Carrier personnel by the use of a trackmobile; am I correct in recalling your testimony to that effect?

A. That is correct, Mr. McMahon.

Q. And had you gone out prior to March 11th to inspect the premises and look over the general situation?

A. I was aware of the premises and the general 166 situation, but I wanted the train personnel that I had selected to make this move to see the situation and the location of the switches on the ground in daylight, consequently after the meeting on the morning of March 10th I took a group which included the engineer and another member of the train crew that was to be selected over to Carrier plant to see the various locations and to see just what had to be done in company with Carrier representatives.

Q. And while you were there, did you see them use this trackmobile?

A. The trackmobile at that time was being used to shift out cars that were in the plant itself.

Q. Can you show us here on this General Counsel's Exhibit No. 2 where the trackmobile was—had pushed these two gondolas, if you can?

A. The two gondolas were placed out on our main track on the very easterly end.

Q. Could you mark on that particular picture where—

A. I would say approximately 350 feet east of the location of the gate (marks photograph).

MR. NAIMARK: Let the record show that he has marked with an X where counsel has asked him to mark.

Q. (By Mr. McMahon) I direct your attention, Mr. Bowes, to the statement purportedly given by you under oath to Mr. John N. Shea, Field Examiner, on the 16th 167 day of March, 1960, in Syracuse, New York. Do you recall having given such a statement, and having given it under oath?

A. That is correct.

Q. I am reading from a typewritten copy of that statement, Mr. Bowes, and I read in your statement that you signed at the bottom of the page, page 1 of the four-page statement "Thursday afternoon I went to the plant with Leo Lawrence and George Miller and spotted the area, and it was also determined that we would allow them to tack on to the 14 cars agreed to any other cars they had ready. They were to switch out these cars with their trackmobile. While we were making an inspection, Carrier personnel were shifting around the cars inside the plant property, and they placed two open top gondolas on the turnaround just inside the gate. These cars carried the Carrier name on the side so it was apparent to anyone, including the pickets, that it was intended that these cars were to be moved out." Is that statement true?

A. That is correct.

Q. And the statement is true, and the statement is correct?

A. That is correct.

Q. I am perhaps wrong, but I understood you to say on direct examination this morning that the gondolas bearing Carrier's name had been moved out during the night. Now, if you did so testify, you would say that that was not correct?

A. Well—

168 Q. Do you recall so testifying?

A. I remember testifying today to the fact that within the last 24 hours the two gondolas had been placed out there. It is quite possible I said that afternoon. I don't recall, but I can say with authority and assurance that the cars were placed within a period of 24 hours prior to the time that the railroad supervision took the cars out.

Q. Did you see them move?

A. No, I understood that they were moved.

Q. Well, then this statement is not correct, is it?

A. What is the statement, if you will, please, Mr. McMahon.

Q. I will be glad to go over it again.

A. Fine. Thank you.

Q. "While we were making an inspection"—this is your inspection that you and Leo Lawrence and George Miller—I will start again. "While we were making the inspection, Carrier personnel were shifting the cars around inside the plant property, and they placed two open top gondolas on the turnaround just inside the gate."

Now, you told me you gave that statement, and you gave it under oath?

A. That is correct. That inspection was being made on the afternoon of the 10th and the cars were out on the track on the 10th.

Q. Well, would you—

168A A. Our switch was made on the 11th, so naturally—

Q. Excuse me, Mr. Bowes.

A. Well, if I might clarify the question, Mr. McMahon, please.

Q. Well, I realize that I am a difficult man, but is it correct that while "We were making an inspection, Carrier personnel were shifting around the cars inside the plant property, and they placed two open top gondolas on the turnaround just inside the gate"?

A. That is correct, Mr. McMahon.

Q. And I show you at the bottom of page 2 of your statement, and I am quoting the statement you made under oath "I walked across the street and unlocked the gate" and then parenthetically "(both Carrier and New York Central personnel have keys for the lock)". So you knew, did you not, Mr. Bowes, on March 16th that Carrier personnel had keys to that padlock or gate, did you not?

A. That is correct.

Q. And when I asked you this morning you said you didn't know?

A. Well, now, I think I am probably out of order, but now I think we are getting a little bit picayune here. I answered the question this morning not to my knowledge do I know the Carrier men have keys to the gate, now—

MR. NAIMARK: I don't believe he should be—

169 TRIAL EXAMINER MAHER: The last statements of this witness will be stricken. I direct the witness that he should answer the questions of counsel. The rights of the witness will be adequately protected by me, but you follow the questions and answer the questions of counsel and to the extent that I have stricken the material, the objection is sustained. Proceed.

Q. (By Mr. McMahon) Well, Mr. Bowes, you testified this morning that people were laying on the track, did you not?

A. I believe I did. I believe the stenographer could refer back to the testimony.

Q. Do you know—

TRIAL EXAMINER MAHER: What was the last statement?

THE WITNESS: I believe I did, and I am sure the stenographer could refer back to the testimony.

TRIAL EXAMINER MAHER: We appreciate your assistance in conducting this trial. Would you please confine your answers to the questions asked.

Proceed, Counsel.

170 Q. I am referring to the statement you gave to Mr. Shea, page 3 "In the melee pickets—of pickets and deputies, some of the pickets either fell, were pushed or laid down on the track in front of the engine. I could not say which." Is that true?

A. Yes.

Q. Didn't you testify to the same thing when you were in court here before that you didn't know if they laid down or were pushed down?

A. I don't recall.

Q. Let me refresh your recollection.

A. I won't question you. If you say I did, I did.

Q. Well, that is exactly what you testified to, Mr. Bowes.

A. Then if you say so, I will accept it.

Q. You testified this morning that you saw Mr. Kowalski drive a car, or did you?

A. I did.

Q. And would you tell us when you saw him?

A. I believe I testified to the fact that between the 3rd and 4th move over Thompson Road I saw Mr. Kowalski drive a car and park same car across our tracks at Thompson Road. And I believe in my former—

Q. About what time was this in the order of switches?

A. In the order of switches, between the third and fourth time going over Thompson Road.

171 Q. Since this date of March 11th up to and including today, how have the deliveries been made through this gate on Thompson Road to Brace, Mueller and Huntley, Western Electric and General Electric, let's take those three first.

A. In what respect how have they been made?

Q. Well, who has manned the trains?

A. The regular train personnel.

Q. And have any incidents been reported to your attention?

A. No.

Q. Who makes the deliveries to Carrier Corporation?

A. New York Central Railroad.

Q. The supervisory personnel or the operating—

A. Operating personnel.

Q. And when did that situation change, or did it change? Well, let me try it this way, Mr. Bowes, I haven't

phrased this very well. As I understand your testimony that from March 2nd we will say that that was the date of the strike, up through March 10th, the operating employees of the railroad were manning the trains and they were making deliveries to Brace, Mueller and Huntley, Western Electric, General Electric, and they were making the coal delivery and pickups to Carrier, am I correct?

A. That is correct.

Q. Then on March 10th, after having the request to deliver railroad cars to Carrier, to take the Carrier 172 products out and to deliver the empties if you made this arrangement which you have discussed about the railroad supervisory personnel manning the train from approximately the Acme plant on the west side of Thompson Road, or west of Thompson Road and making the deliveries and—making the deliveries of the empties and picking up the cars from the Carrier Warehouse, and am I correct that this was the arrangement and this is what worked out?

A. Yes.

Q. And you describe these incidents on March 11th. And since that time have there been any such incidents?

A. No.

Q. Of any kind?

A. Correct.

Q. Now, do the railroad supervisory personnel still man the trains?

A. No, at the present time they are not.

Q. For how long is this situation?

A. They commenced manning the train on March 11th and it ran for several weeks with railroad supervision.

Q. Now, the railroad operating employees make all deliveries through this gate?

A. That is correct.

Q. And without incident or threat of any kind?

A. That is correct.

173 Q. Now, you have marked, as I understand your view of this matter, Mr. Bowes, that I am looking at General Counsel's Exhibit No. 2, and I understand that your view is that the railroad owns all this track, and that Carrier owns some other tracks that go off, and Brace, Mueller, Huntley owns the track that runs off to the south?

A. That is correct.

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175 Q. I ask you to look at this copy of your statement of four pages, Mr. Bowes, and I ask you whether or not in that statement of four pages you mentioned the name of Mr. Hosid? If you would like the original statement, I am sure—

A. I would say without looking at it his name is not mentioned.

Q. All right. Will you accept my statement that I re-read the transcript of this testimony of March 8th, and you didn't mention his name?

A. That is correct. I don't believe that I did. At that time I did not know his identity. It has been since that I have identified the individual. As a matter of fact, I didn't know Mr. Kowalski until a later date.

Q. Who identified, made his identification for you?

A. A representative of the Carrier people.

Q. Do you know what their names were?

A. Yes, I do.

Q. Would you mind giving them to us?

A. Mr. Ralph Wilegus, Traffic Director of Carrier.

Q. When did he point out the names of these people to you?

A. I really couldn't say just when it was.

Q. Was it after April 8th?

A. Yes.

177 Q. You testified here this morning about an incident in which you say one of the pickets made a request of the people operating the train at a time when you were present, when a request was made to the operating personnel not to make deliveries to Carrier. Would you give us the time and the place?

A. I don't recall the exact date right now. It was 178 some time between March 2nd, and the 10th, and the place was right there at Thompson Road on the west side. I believe, if I recollect correctly now, the previous testimony and to the previous hearing in this court room I testified to the fact that the operation was for the train—would be stopped at that point, and—

Q.: It was objected to and stricken, Mr. Bowes.

A. Beg pardon?

Q. It was objected to at that time as being hearsay and you didn't have as much luck with Judge Brennan as you had with the Trial Examiner because he struck your testimony. Now—

MR. NAIMARK: I don't understand. Are you asking him a question?

MR. McMAHON: I am asking him a question.

MR. NAIMARK: And he is trying to answer.

MR. McMAHON: His answer was, which I submit was not responsive, was that he believed that he testified to something at the hearing here on April 8th. And to assist him beyond that point I refreshed his recollection as to what happened on April 8th, and there was no such testimony, because we couldn't get to the point of him identifying the time and the place and which one of the pickets, or was it a picket, said to some of the operating personnel of the railroad—I understand today that for the first 179 time he now says a threat was made to him. This would be, I suppose, irrelevant under 8 (b) (4) double I, but now we are getting to the point of induce or encourage, and he is testifying to a very important point, and I want to know when this happened. It is conversation between the picket and the operating crew.

MR. NAIMARK: I have no objection.

MR. McMAHON: I want to make my point clear.

MR. NAIMARK: I don't just like reference to the luck that he is having here.

MR. McMAHON: Oh, all right, that is an unfortunate characterization.

Q. (By Mr. McMahon) Could you help me out there, Mr. Witness—strike that out—Would you answer the question? Can you give us the time and the place?

A. The place was Thompson Road. The time and the date I don't know.

MR. McMAHON: I move to strike it out. It is without foundation. All his testimony with respect to pickets making requests of railroad operating personnel, as being hearsay and without being able to fix the time and place sufficiently to prepare our defense.

TRIAL EXAMINER MAHER: The motion is denied. Proceed.

Q. (By Mr. McMahon) Was it on March 2nd that this happened, Mr. Bowes?

180 A. I previously testified, Mr. McMahon, in this court room this morning that it was some time between March 2nd and March 10th, and the witness would be very happy to give you the exact date if he could recall.

Q. Was it March 3rd?

A. In all fairness, I couldn't answer that question whether it was or not.

Q. If I asked you, if I went through this each day—

A. If you enumerated each day I could not answer because then I would be definitely telling a falsehood. I already expressed myself.

Q. Do you recall the time of day, morning or afternoon?

A. Approximately noon time. That is the general time the switch is made, and so there is reason to assume it was around noon time.

Q. Can you fix it at that time? It was one of the eight days?

A. That is correct.

Q. Do you know the names of your crew, of the operating crew?

A. When?

Q. Well, let me ask, do they vary from day to day or would it be the same crew?

A. It has varied from day to day.

Q. Do you recall who the members of your crew 181 were to whom this remark was made?

A. No, I don't. I know the conductor in charge of that train was named Williams.

Q. Well, was the remark addressed to him?

A. The remark I believe was addressed to him. It was addressed to the train personnel, let's put it that way, and he is a member of the train personnel.

Q. Is he supervision or is he operating crew?

A. He is operation.

Q. And you can't fix the date, and you can't give us the name?

A. I reiterate I cannot fix the date, Mr. McMahon.

Q. Were you able to identify in this meeting over at this hotel—did you go over any pictures to see if you could find out the name of the picket who made this request?

A. No.

Q. You weren't interested in that?

A. No.

MR. NAIMARK: I object to it.

TRIAL EXAMINER MAHER: Your objection is overruled.

Q. (By Mr. McMahon) Is there only one incident that

you know of where you were there and this request was made?

A. You are asking me if there was only one incident that I know. No. There were many instances that I knew of from hearsay information, but only being present on one occasion.

182 Q. You were only present on one occasion?

A. That is correct.

Q. Well, on this particular day that you can't remember today, did the pickets ask the operating crew "what we had or what we were doing", "and when the train crew explained they were delivering or picking up for one of the other three plants, delivering the coal, the pickets would make no attempt to dissuade the cars from going through and allow them to pass without hindrance"?

A. That is correct.

Q. Did you make that statement?

A. Yes.

Q. And that is what happened on this particular day?

A. That is correct, Mr. McMahon. And that is the day I heard "Stay to the left and don't—Stay to the right, don't go to the left."

Q. Was this on March 11th?

A. No, it wasn't on March 11th.

Q. How many times were you on that train that went through making the delivery, through to Carrier?

A. I was on it on March 11th, and on it one day prior to that.

Q. And that is the date when you heard this request that you tell us about?

A. The date prior to March 11th was the date 183 that I heard the request, that is correct. I went over there to check on the hearsay report that that is what was being done.

Q. Well, I don't want any more hearsay than I have had.

A. That is why I checked it. That is why I checked it to have the absolute proof of it.

Q. On this other time, do you recall where you were going and what the occasion was for you to ride this train?

A. I have previously testified to check on this hearsay report of the crews being interrogated as to what their performance for the day was going to be.

Q. And you rode out on the train to do it?

A. That is correct.

Q. And then you made this check, this one check?

A. That is correct.

Q. When was the first time that you were told by the operating crew or that you first received information that they were not going to make pickups or deliveries of the loaded cars of Carrier Corporation, that is to say other than the coal cars?

A. I would say that was probably shortly after the second of March. I might have testified at the previous hearing it was on the third. I don't recall now.

Q. What is your testimony as to when you were told?

A. I believe I have already answered the question, Mr. McMahon.

184 Did you have to be told, or did you just know that they weren't going to make the delivery with the picket line?

A. I had my own suspicions that they would respect the picket lines. I testified to that previously, and also today.

Q. Had you had proper discussions with the railroad personnel about these deliveries prior to this meeting on March 10th?

A. Yes, I believe I asked the train crew, as previously testified here just a few questions back that early, possibly shortly after the second of March I asked the crew what their intentions were merely to confirm my suspicions and belief that they would respect the picket lines.

Q. And your suspicions were confirmed?

A. That is correct.

Q. But then later on, it was after this incident of either this meeting with the operating crew after March 3rd when your suspicions were confirmed that they were not going to make deliveries to Carrier, you then say you received this, received your hearsay reports that they were being asked not to make deliveries to Carrier, and now you rode this train out there to hear with your own ears the pickets make this plea to your operating crew, that is your testimony now?

A. I wouldn't go as far as to say it was a plea.

185 Q. (By Mr. McMahon) I would like to have an answer. It is either at the March 2nd or March 3rd—it is not important, but let's just take March 3rd, and I hasten to assure you that you didn't testify about this

March 3rd before. On March 3rd about that time you had suspicions that the operating crew was going to respect this picket line at Carrier, and you met with them and they confirmed your suspicion. That much is so?

A. That is correct, Mr. McMahon, and if I might clarify a point here—

Q. Let me try to do it by asking questions, and we appreciate you are being very patient.

So then you say you heard reports that—you heard reports that the pickets were asking the operating crew not to make deliveries to Carrier; is that so?

A. That is correct.

186 Q. And then these were hearsay, as you tell us, and that you then rode out on this train on this day that you can't recall the date, and you heard one of these pickets ask the operating crew not to—go to the right and don't go to the left; is that so?

A. Correct.

Q. Let me ask you this: You knew that they weren't going to do it any way. Was it a matter of getting testimony for that point you wanted to do it?

MR. NAIMARK: I object to that. I don't understand what he means by "testimony".

Q. (By Mr. McMahon) The question is this. Let me restate it, rephrase it.

Why was Mr. Bowes, when he had already been, from his long experience, already had suspicions as to what the consequences of picket lines were, he had confirmed his suspicions as to what the reaction of the operating crew was as to this particular picket line, and then why did he

take the trouble to go out and check what he characterizes as hearsay reports to hear whether or not these pickets were making requests of the operating crew.

Now, I just would like to explore that matter, and I think it is perfectly proper.

A. I am very happy that you asked that question, Mr. McMahon, and I will be happy to answer you.

187 Q. We will all be happy.

A. Because I knew that you would not accept my hearsay information.

Q. That is exactly it. You wanted to be able to testify in the injunction actions which you knew were going to be brought and to be able to give straightforward testimony that "I was there"?

188 Q. (By Mr. McMahon) You made this statement, did you not, and you made it under oath, did you not?

A. What is the statement, first?

Q. This entire statement to Mr.—

A. Absolutely, Mr. McMahon.

Q. And then your statement is this, and I am reading from it, and let me go over it. "The pickets would ask them what we had or were doing, and when the crew explained that they were delivering or picking up for one of the other three plants, or delivering the coal, the pickets made no attempt to dissuade the crew from going through and allowing them to pass without hindrance." Did you make that particular statement?

A. That is correct, Mr. McMahon.

Q. And it is true then and it is true now?

A. Absolutely, plus everything I have said then and now, positively true.

MR. McMAHON: I move to strike that out.

A. Although there might have been a few minor inconsistencies.

190

REDIRECT EXAMINATION

Q. (By Mr. Naimark) I show you GC 6 in evidence, and ask you whether or not you recognize that car as the car you testified to that was driven by John Kowalski?

A. I would say that that does appear to be the car, or similar car driven by John Kowalski. I must confess that I did not see the registration of the car, but it seems to be the car. It certainly seems to be the incident. I recognize—

Q. Just answer my question. Just you recognize the car?

A. Yes.

Q. That is all I want. I show you what has been marked in evidence as GC 7, and ask you if you recognize John Kowalski in that picture, the man whom you know to be John Kowalski?

A. I do, sir.

Q. Will you place an X alongside or above his—

TRIAL EXAMINER MAHER: May I see it after it is so marked?

MR. NAIMARK: You say you want to see it then?

TRIAL EXAMINER MAHER: Yes.

MR. NAIMARK: Yes.

(Witness marks exhibit.)

TRIAL EXAMINER MAHER: I want the record to show that I too can identify Mr. Kowalski.

I thank you, Mr. Naimark.

MR. NAIMARK: That is all.

198. Q. (By Trial Examiner Maher) Mr. Bowes, in running a train on the DeWitt end, over the main line, and going back behind Acme, you said that if you had run an engine directly out there and spotted it at Carrier without any further ado the employer, New York Central would be violating the contract with your own people. In what respect, if you know? Would you consider such an operation to be in violation of your contract with your employees?

A. Mr. Examiner, I will be happy to clarify that point. They have the contract to carry freight, to operate the train.

Supervision does not hold that contract. Therefore, work that rightfully belongs to, namely, the engineer, the conductor and the trainmen, no one else has a right to perform that service, otherwise we would be subjected to a day's pay on the parts of the various crafts claiming it.

Q. In other words, what you said was, I guess I must have misunderstood your testimony. What you said was or implied was that if you put supervisory personnel on the trains and ran it out and that particular mode of

getting it there would be in violation because it was run by supervision?

A. That is correct. Maybe I didn't make myself clear.

Q. It is clear now.

My next question stems from that. Who were your people whom you had out there on March 10th for the purpose of alerting them on the situation and in preparation for the following day's switch?

A. Mr. Miller, my engineer, that is the supervisory, that I selected to be there.

Q. He is a supervisor?

A. He was a supervisor whom I had selected to run the engine on this particular occasion, and also one of the men I was going to have working on the ground.

Q. And he was the supervisor?

A. He was another supervisor, as a matter of fact there was another trainmaster, I believe his name was Lawrence.

Q. Thank you. Now, you indicated that for a period of time supervisory personnel manned the trains in and out of this disputed area, and that they no longer do so?

Why have the operations of switch engines and 200 trains generally been returned to the operation by rank and file personnel?

A. Because there are no longer any pickets there to obstruct the progress of the train.

MR. McMAHON: I object to the word "obstruct", Mr. Trial Examiner.

MR. NAIMARK: Well, it is responsive to the question.

He asked him why it is not there any more. That is the only way he can answer.

MR. McMAHON: That is question-begging in this particular lawsuit.

TRIAL EXAMINER MAHER: Your objection is overruled.

Q. (By Trial Examiner Maher) Now, just for my edification, and if we can do it in one short paragraph it will be helpful. There were four passages of the switch engine over Thompson Road on the morning of the 10th, and I have been puzzled here with my own paper and pencil to figure those four movements out. Could you describe them in short detail?

A. Number 1, Mr. Examiner, if I may, I think there should be a correction there. On the 11th, not the morning of the 10th.

Q. Thank you. You are right.

A. Let me enumerate all the moves over Thompson Road, if I may briefly, on the day in question, March 11.

Q. Before you do, may I ask you this in starting out, does the switcher pull the cars?

201 A. The switcher pulls the cars.

Q. That is all I want to know. Take it from there.

A. The first move across Thompson Road on March 11th was made by railroad personnel representing the crafts, the engineer, firemen, conductors, and trainmen. They made their first move over Thompson Road, and they serviced Brace, Mueller, Huxley, Western Electric, G.E. and the Carrier coal plant.

The second move was when they came out.

The third move was made by railroad personnel when they took 14 empty box cars into the TR warehouse.

The fourth move out onto Thompson Road, but not fully across Thompson Road was made when the 14 loaded box cars out of TR 19 was brought out of the warehouse, cut off, the engine was cut off—Correction. The engine was cut off and placed on the westerly end of the empty box cars.

Did I say that was the fourth move out on the road?

Then the fifth move was when the engine came back from the warehouse, right after having placed the 14 empty box cars into the warehouse, and in order to get in on the westerly end of the 14 loads, it was necessary for the fifth time to enter upon Thompson Road.

Q. Well, how would they do it? Would they go down the line a way on the spur and switch back to the next track?

A. I think I can refer to one of these exhibits, if I may, the one that shows the track, if I may? See, the 14 202 loaded cars that came out of the warehouse?

Q. You are referring to—

MR. NAIMARK: GC 2.

A. The 14 loaded cars, Mr. Examiner, were on this spur right here.

Q. (By Trial Examiner Maher) That is the run-around?

A. So corrected, run-around/switch, that is correct. The engine comes out from the warehouse over here, right there, in order to get in onto the end of those loaded box cars which are standing on the spur.

Q. Don't tell me they have to go all the way back on Thompson Road and switch around?

A. No.

Q. Thank you. O.K.

A. I want to make sure I am moving my cars properly. Then the last move was a complete move across Thompson Road, going home.

TRIAL EXAMINER MAHER: Do Counsel have any questions of this witness which relate to matters which I raised in my questioning?

MR. NAIMARK: No.

Q. (By Mr. McMahon) On this series of moves where you say you saw Mr. John Kowalski.

A. When I first saw John Kowalski, I trust you mean?

Q. Yes.

203 A. I was standing at the switch just inside the gate at Thompson Road when a car driven by John Kowalski entered upon the particular area.

Q. And where was the train at that time?

A. At that time the engine as such was back in the warehouse of TR 19.

Q. Were the gates opened or closed?

A. The gates at the time that Mr. Kowalski drove the car, were closed.

MR. McMAHON: I have no further questions.

Q. (By Trial Examiner Maher) Why were the gates closed?

A. I don't know.

Q. Is it customary to close those gates between switching moves?

A. I believe, sir, it is.

Q. I am still troubled about the keys to that gate. Who has them regularly in your organization?

A. Let me say this, Mr. Examiner: Those keys were supplied me prior to the switch, that short switch we were going to make on March 11th by the security protection men of Carrier.

206 DOMINICK TEDESCO, a witness called by and on behalf of General Counsel, being duly sworn, was examined and testified as follows:

TRIAL EXAMINER MAHER: Please be seated and give your name and address to the stenographer.

THE WITNESS: Dominick Tedesco, 402 Snyder Avenue, Syracuse, New York.

TRIAL EXAMINER MAHER: Dominick Tedesco?

THE WITNESS: Yes.

TRIAL EXAMINER MAHER: T-e-d-e-s-c-o?

THE WITNESS: Yes.

DIRECT EXAMINATION

Q. (By Mr. Naimark) Mr. Tedesco, by whom are you employed?

A. The County Sheriff's Department of Onondaga.

Q. Try and speak up a little loud.

A. Onondaga County Sheriff's Department.

Q. What is your position with them?

A. A civil and criminal deputy.

Q. If you are known as a Deputy Sheriff?

A. Yes, sir.

Q. And generally, briefly, what are your duties as such?

A. Well, we handle summonses and complaints, and also do road patrol.

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207 Q. And where did you go, any particular gate?

A. To the railroad gate.

Q. And will you tell us what you observed—were you there alone? Did you come alone?

A. No, there was several of us.

Q. And will you tell us what you observed when you arrived?

A. Well, we arrived there and the sergeant told us to sit in the car and wait for orders, so then the pickets, Carrier, the Steelworkers, they were walking in a circle in front of the gate, and prior to the time the train came we were still sitting in the car until we were ordered to get out of the car when the train came, and that is
208 what we were ordered to do.

Q. I show you General Counsel's Exhibit 2. Is that the premises you have testified to?

A. That is the gate, yes, sir.

Q. Is that where the pickets were when you arrived?

A. They were walking in a circle over the tracks.

Q. About how many pickets were there, approximately?

A. Well, at first there was about ten, twelve pickets, to start off.

Q. Did they have any identification?

A. They wore buttons.

Q. Could you see those buttons?

A. Yes, it was a white button with blue lettering with United Steelworkers of America. You couldn't read the Local number on it, that is all.

Q. Were you there when the train passed across Thompson Road?

A. Yes, sir.

Q. Will you describe what you saw at that time?

A. Well, they wasn't going to let the train get in the gate, and Brewster was right there when I was talking to him, and I told him to go ahead and let him in.

Q. Francis Brewster?

A. Francis Brewster, right, and to let him in because they were going over to the other plants, and as far
209 as I knew—

Q. Letting who in?

A. The railroad, the train, and the cars to go in. And first thing I know he called us and told the fellows to break it up. He spoke to the captain, whoever the captain was on the gate, and they more or less broke up and let the train go in without any—

Q. And then what happened?

A. Well, after the train was inside, the pickets still were walking in a circle, we went back in the car and waited for further orders.

Well, when the train came out, they said if the train stopped at the Carrier siding that train wasn't going to come out.

Q. Who said that?

A. Brewster, Francis Brewster. Well, in fact, several of the others, but I don't know what their names were. And when the train did start to come out the fellows were gathering around in front of the train, they wouldn't let it come out, so we had to more or less push them in to one side in order to let the train out. One lad turned and said the only way that train would come out, over his dead body, which was Paul P. King.

Q. One of—Who is Paul King?

A. One of the pickets.

Q. Is he an employee of Carrier?

210 A. A former employee of Carrier.

So I tried to get him off the track, and it took four of us to get him off, and so I place him under arrest, locked him up and in the meantime Roger Potter was having a little difficulty too. He was pushed to one side and he fell down after being told to get off the tracks, and—

Q. Who is Roger Potter?

A. Another picket, one of the Carrier employees. He got up and was swinging his hands and I getting slapped across the face by him, probably not intentionally, but I took it for granted that it was, so I place him under arrest.

In the meantime I took off from there. I brought both of the fellows down to the County Penitentiary, or I mean the Cedar Street jail.

Q. And this Rogers, what did you see him do?

A. He was swinging, first it looked as if he was going to swing at one of our deputies, Deputy Scarsp, and when I went in he was still swinging, and I got the slap across the face.

Q. Did you see a car drive up to the premises when you were there?

A. I was gone when that thing happened, I wasn't there.

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223 RAYMOND E. NASH, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER MAHER: Please be seated and give your name and address to the reporter.

THE WITNESS: Raymond E. Nash, 1302 First North Street, Syracuse, New York.

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225 Q. (By Mr. Naimark) Mr. Nash, by whom are you employed?

A. Onondaga County Sheriff's Department, Syracuse, New York.

Q. Are you a Deputy Sheriff?

A. I am a Deputy Sheriff, criminal and civil.

Q. And in connection with your duties as a Deputy Sheriff, were you assigned to work at the Carrier premises?

A. I was.

Q. And will you tell us when approximately you were on duty there?

A. April 11 and prior to—Oh, pardon me. April—March 11, and prior to April 4th.

Q. Well, with reference to the latter date, you mentioned, were you on duty at the main gate?

A. I was.

MR. McMAHON: By the latter date—you have three dates, as I understand.

A. April 4th.

Q. (By Mr. Naimark) March 11th, and prior to April 4th, what do you mean by prior to April 4th?

A. That is on duty.

Q. What date?

A. I do not recall the specific date.

TRIAL EXAMINER MAHER: Speak up. I can't hear you.

A. I do not recall the specific dates prior to April 4th.

Q. (By Mr. Naimark) Were you on duty April 4th?

226 A. I was.

Q. And will you describe what you saw when you were on duty or when you were working at the main gate that day?

A. I saw many pickets walking the picket line in front of gate 1 on the eastern side of Thompson Road.

Q. Did they have any identification?

A. They had buttons of some color or description upon them.

Q. Could you see or did you notice what was on the buttons?

A. The United Steelworkers of America.

Q. And were there any signs, picket signs that you observed?

A. There were several of them in the picket line but I do not recall specific reading upon them.

Q. Did anything occur or happen to you that day while you were there?

A. There was, yes.

Q. Will you tell us what happened to you?

A. I was coming from the parking lot on the other side of Thompson Road opposite Gate 1, proceeding to the picket line on Thompson Road east when I was knocked to the ground, beaten, pounded about the face, my eyes punctured—about to be punctured out, and so forth.

Q. Well, now, who did this? Have you any one that is—

A. Harland Wallace.

Q. Harland Wallace, and who is he?

A. He is one of the pickets of the Carrier plant.

Q. Was he an employee?

227 A. He was an employee at the plant prior to the strike.

Q. Were there other employees present when this happened?

A. They were.

Q. And can you describe exactly what happened to you or what Mr. Wallace did?

A. There was one picket not known, his name not known to me.

Q. No, by Mr. Wallace.

A. By Mr. Wallace? Mr. Wallace dragged me to the ground, hit me and dragged me to the ground pounding me about the face in several places, crumpled my glasses, grabbed me by the hair of the head and pounded my head upon the pavement and took two fingers of the hand, I do not know what hand, and put them into my eyes and dragged my left eye out.

Q. What happened to you after that?

A. I was sent to the car to wait for the ambulance and from there I went to St. Joseph's Hospital, and from there to an eye specialist and back to the hospital.

MR. NAIMARK: No further questions.

TRIAL EXAMINER MAHER: Mr. McMahon.

CROSS EXAMINATION

Q. (By Mr. McMahon) Sheriff Nash?

A. That is correct.

Q. This happened on April 4 at the main gate of 228 Thompson Road?

A. That is correct, opposite the main gate.

Q. And did you talk to any of the representatives of the Regional Director's office of the National Labor Relations Board?

A. I did.

Q. When was that?

A. The date I do not recall.

Q. Was it this month?

A. I don't recall if it was this month or the latter part of April, I do not know.

Q. Approximately how long ago would you say?

A. That I couldn't tell you right offhand. I don't remember.

Q. Was it a couple of weeks ago?

A. Two weeks ago or more approximately.

Q. Two weeks ago or more?

I would like to direct the Hearing Examiner's attention to the fact that it seems fairly clear that Harland Wallace's name was added in yesterday's amendments to the pleadings, and this is the first testimony we hear about him, and according to Sheriff Nash here he communicated this information to Mr. Naimark or his representatives over two weeks ago, and it seems to me that it is unfair to, in view of this development,—I renew my motion to disallow this amendment of the pleadings at this late date.

TRIAL EXAMINER MAHER: I note on the 229 record a discussion at the time the amendment was offered yesterday, that Respondent's Counsel was advised of these amendments, together with Harland Wallace's name on the afternoon or evening of last Thursday which was, I believe—

MR. NAIMARK: The 5th.

TRIAL EXAMINER MAHER: May 5th, and while Counsel indicated that he was in Buffalo at the time, and since I think it appears in this case also, it shows that Respondent was also represented by local counsel so that

all of the facts relating to your motion are before me, and I deny it.

MR. McMAHON: Well, the only thing additional I wanted now is the fact that they knew this matter two weeks ago at the least.

Q. (By Mr. McMahon) Now, you say you went to the hospital, Sheriff?

A. I did.

Q. And how long did you remain there?

A. Possibly 40 minutes, possibly.

Q. 40 months?

A. Minutes.

Q. Oh, forty minutes?

A. Forty minutes.

Q. And did I understand you to say that your left eye was dragged out?

A. It was at that time, yes, sir.

230 Q. And your glasses were broke?

A. Yes.

Q. You have your left eye now?

A. Yes, sir.

Q. And did this Harland Wallace just come up and accost you and knock you down; is that your testimony?

A. No, he was there beating and pounding another sheriff by the name of Deputy Barone.

Q. And then what happened?

A. Deputy Barone called to me and asked my assist-

ance, and I stepped in and when I did, someone unknown, a picket, jumped on my back, Harland Wallace dragged me to the ground and punched me in the face several times.

Q. Was it Sheriff Barone?

A. Right.

Q. Did you have a night stick, police club?

A. No, sir.

Q. Were you carrying a revolver?

A. Yes, sir.

Q. Were you carrying a billy club?

A. Yes, carrying the blackjack in my rear pocket.

Q. You were carrying a blackjack. Did you say anything to Harland Wallace or any of the other pickets?

A. No.

Q. You didn't say a word?

231 Q. You say you saw many pickets in front of Gate No. 1 on the date of April 4th, and you say you saw the pickets had badges. Did you see them from the west side of Thompson Road?

A. Yes.

Q. And did all those pickets have badges?

A. That I do not recall. I did not count them.

Q. Was April 4th a Monday?

A. It was.

Q. And this was the date that the back-to-work movement was to start at Carrier plant, or am I incorrect, or do you know?

A. They had been to work for some time before that, many days before that.

Q. How many?

A. Many. I do not know.

Q. How long were you off from work, Sheriff, as a result of this pummelling you described, or were you?

A. I was not off from work on complaint. I worked at the office, stayed in the office to draw my salary.

Q. Did they place bandages on your head at the hospital, or was that necessary?

A. They put a bandage on my eye.

Q. It was just your eye?

A. Just my eye.

Q. And this pummelling or pounding of your head 232 upon the pavement, this didn't break the skin in your scalp?

A. It damaged my face in many places.

Q. Well, I thought it was the back of your head that was knocked down?

A. Well, it was the side of my face. He grabbed me by the hair of the head and pounded my head on the pavement, my head is everything above my chin.

Q. I understand. Did it require stitches?

A. No, it did not.

Q. Your main complaint was your eye and this took about forty minutes to repair?

A. No, I was in the hospital about 40 minutes and went to Doctor's office, was directed to an eye specialist,

went back to the hospital and made several calls, office calls thereafter to the eye specialist.

Q. Well, I understand that you went to the hospital and then you went from the—how long were you at the hospital the first time?

A. Forty minutes.

Q. Then you went to the eye doctor?

A. Right.

Q. And how long were you there?

A. I was there possibly around forty minutes.

Q. Then you went back to the hospital for another forty minutes?

233 Right.

Q. So it just happened that at all three places it was forty minutes?

A. On or about that time, I did not time it.

Q. Forty minutes at the hospital and forty minutes at the doctor, and forty minutes at the hospital again?

A. On or about that time. I did not time it.

* * *

234 Q. (By Mr. McMahon) One further question. Did you swear out a warrant for the arrest of Harland Wallace?

A. Did I?

Q. Yes.

A. I was in the hospital.

Q. Did you particularly?

A. No.

235 DAVID WOOD, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER MAHER: Please be seated and give your name and address to the reporter.

THE WITNESS: David Wood, 16 Bear Road, North Syracuse.

TRIAL EXAMINER MAHER: What is your name?

THE WITNESS: David Wood.

DIRECT EXAMINATION

Q. (By Mr. Naimark) Mr. Wood, by whom are you employed?

A. Carrier Corporation.

Q. And what is your position with Carrier?

A. Captain of Security and Protection.

Q. And how long have you been employed by the company?

A. Thirteen years.

Q. And briefly and generally what are your duties as captain of security?

A. The security of the plant area, keys, locks, the Government security contracts, the security on Gov-
236 ernment contracts, protection of the property, fire protection, field inspections.

Q. Do you have any employees or other guards who work under you?

A. Yes, sir.

Q. And approximately how many of these are there?

A. Thirty.

Q. Now, directing your attention to March 11, were you on duty or present at the railroad gate on Thompson Road?

A. I was.

Q. And where were you in relation to the gate?

A. About fifteen feet inside the gate.

Q. And approximately what time were you there?

A. Approximately twenty minutes to three.

Q. Were there pickets there at the time?

A. There were.

Q. Approximately how many pickets?

A. Approximately thirty.

Q. Were there any identification signs either—well, were there any identification signs with respect to the Steelworkers there?

A. The pickets wore badges, white badge that they had worn throughout the strike, and the—

Q. You mean buttons?

A. Buttons.

237 Q. Were there any inscriptions on the buttons?

A. Yes, United Steelworkers of America.

Q. Go ahead.

A. There was a placard on the side of the road, on the

east side of the road that says "This plant on strike, United Steelworkers of America."

Q. Now, what took place? Did you observe the train at the time that you were there?

A. I did.

Q. Will you tell us what you observed.

A. The train came back from the warehouse, the empty engine with just the engine, pulled up to the gates, the gates were open, the train pulled out into Thompson Road. The pickets that were milling in the area across the railroad tracks in front of the gates, between the gates and the road, were forced back. The switch was thrown. The engine backed into the plant area, then connected to the 16 cars that were lined up on the track. The engine then pulled forward. The Deputies and railroad police were at the front of the engine and had to force their way into the group of pickets pushing them back out into the road or off the tracks on either side to get the engine out.

Q. What were the pickets doing when the train proceeded across the track?

A. They were milling in front of the train, attempting to grab at it, hold it back, and there was just a wild melee out there going in all directions, all kinds of shouts and cat calls.

Q. Did you see either John Kowalski or Frank Brewster there?

A. I did.

MR. McMAHON: I object to the form of the question, did he see either, and he got the answer yes.

MR. NAIMARK: All right.

TRIAL EXAMINER MAHER: Break it down.

Q. (By Mr. Naimark) Did you see John Kowalski there?

A: I did, yes, sir.

Q. Did you see Frank Brewster there?

A. Yes, sir.

Q. What were they doing in the group, did you observe them?

A. When I first arrived there, Mr. Kowalski was standing or rather walking in the group right directly in front of the gate. Francis Brewster was also in that group.

Q. Did you hear either one of them say anything to the pickets?

A. No, sir.

Q. Did Mr. Brewster, or anyone else—Did Mr. Brewster, Frank Brewster, Francis Brewster, say anything to you?

A. He did as we closed the gates, as we closed the gates after the train was out and across the road, the 239 pickets again milled up against the gates, and he shouted and walked over to the gates "We will take care of you guys when you come out, you scabs."

Q. Was anyone with Francis Brewster when he said that?

A. There was another picket there by the name of Dominick Albanese, who was also hollering through the fence.

TRIAL EXAMINER MAHER: By the name of what?

THE WITNESS: Dominick Albanese.

Q. (By Mr. Naimark) Is he an employee of Carrier?

A. Yes, sir.

Q. Was anything done by the pickets?

A. As we left the gate area they were still cat calling, screaming after us and threw some lumps of snow and stones from the roadbed over in the property in back of us.

Q. Incidentally, did you have anything to do with the keys from the railroad gate?

A. Yes, sir.

Q. And who keeps the keys for this gate?

A. The railroad crew has one set of keys for the gates, and we have a master key that opens all of the locks on Carrier premises.

Q. Do any of your employees use these premises through the gate where the railroad tracks pass?

A. I didn't understand the question.

Q. Do any of your guards, or do you know of any 240 employees of Carrier who use this property where the railroad tracks pass the gate?

A. No, sir.

244 Q. (By Mr. Naimark) Directing your attention to March 4th, were you on duty at gate 1 at the Carrier?

A. Yes, sir.

Q. And do you know Arthur Calland?

A. Yes.

Q. Who is he?

A. He is an employee of a company, a member of the Steelworkers Union, one of the officers of the Union.

Q. And did you see him there at that time?

A. I did.

Q. And what was he doing?

A. He was talking to one of the female employees 245 of Carrier Corporation who has under her control certain employees who are University students, and are hired on a part time capacity to work in the blueprint library and who had been stopped by the picket line because he had a temporary badge, and in agreeing to allow this employee in, Mr. Calland said that as of the following Monday they were not going to honor any temporary badges.

Q. Do you know the name of the employee that Arthur Calland was speaking to, the girl you mentioned?

A. Ruth Fitzgerald.

Q. Did you have occasion to see Mr. Kowalski that day, John Kowalski?

A. I am not certain. This is March 4th?

Q. March 4th.

A. I am not certain. It escapes me now. I may have.

Q. Well, did you have occasion at any time thereafter to speak to John Kowalski on the premises?

A. Yes.

Q. And when would that be?

A. That was on the evening of March 11th after the railroad incident two of the employees of Carrier, the

salaried employees who were in charge of the, or were working on the shipment of cars from TR 1 reported that they had been threatened and were afraid to—

MR. McMAHON: I object to this as hearsay, it is 246 matter outside of the presence of the respondents herein, not under oath, it is matters beyond the charge.

MR. NAIMARK: Well, this is background as to how he happened to be on duty.

MR. McMAHON: I submit whatever background—whatever we call it, it may be as background information, it is prejudicial and inflammatory and whatever probative value it may have is grossly outweighed by its impact on the respondents.

TRIAL EXAMINER MAHER: Were you on duty when these statements were made to you?

THE WITNESS: The statements of the employees that had been threatened, yes, sir.

TRIAL EXAMINER MAHER: Was listening to or hearing such statements of the employees in the usual course of your job?

THE WITNESS: Yes, sir.

TRIAL EXAMINER MAHER: The objection is overruled.

MR. McMAHON: I submit that that is—May I ask if that something that in the ordinary course of business rule? It is not a book or record or written statement?

TRIAL EXAMINER MAHER: He testified to an incident that occurred during the performance of his duties.

MR. McMAHON: If it is not—As to an incident, Mr. Trial Examiner? Maybe I misunderstand.

TRIAL EXAMINER MAHER: It was an incident, in my understanding of the incident, was the individual 247 reporting to a security officer an item that occurred to them, and to an officer in the organization who was responsible for receiving such complaints, and that was in his capacity, that was an incident.

MR. McMAHON: Well, as I understand it, and I just want to explicate on the rule, my understanding it is directed to an incident, it is a verbal account?

TRIAL EXAMINER MAHER: That is right.

MR. McMAHON: But I submit it is not part of the res gestae. It was outside of the presence of the respondents, it is not under oath, and it is hearsay. For all those reasons I submit it is prejudicial.

TRIAL EXAMINER MAHER: I overrule your objection.

Q. (By Mr. Naimark) I say go ahead.

A. These men requested several guards to the lot, the south end of the premises, to pick up their car.

MR. McMAHON: May I have a continuing objection?

TRIAL EXAMINER MAHER: You may.

A. The man who was head of the Department, who controls our department, Charles T. Simmons, who is in charge of the order handling department, was coming out the gate and volunteered to drive these people in his car through the picket line to their parking lot where their 248 car was parked. With these two men in his car he pulled up to within a car length of the picket line where the car was stopped, and Mr. Kowalski came on the property.

TRIAL EXAMINER MAHER: Where were you when this took place?

THE WITNESS: I was at the entrance to TR 9, the gate house or gate building is gate 1.

TRIAL EXAMINER MAHER: How far away from there?

THE WITNESS: Approximately 80 feet.

TRIAL EXAMINER MAHER: Proceed.

A. Mr. Kowalski came on the property and started to object to the driver of the car and I immediately proceeded to the vicinity of the car and Mr. Simmons got out of the car and Mr. Kowalski stated he was going to inspect the trunk of the car. I told him he was on company property, he would have to remove himself from company property. This he refused to do until he looked in the back trunk of the car.

Mr. Simmons looked at me. I told him he did not have to under any circumstances open his car for inspection by any person, and Mr. Kowalski stated he wasn't going to get off the property until he did open the trunk of his car.

I called for a Deputy Sheriff, and the Deputy Sheriff came across the road and as he came across the road, Mr. Simmons opened the trunk of the car and Mr. Kowalski took one quick look and got off back to the picket line, off the Carrier property.

249 During the course of the discussion, Mr. Kowalski told me that they were not going to allow any more salaried employees in or out—out, but not in, of Carrier Corporation because of the dirty trick that was pulled by taking the train out, and he was going to make Wampler, Mr. Wampler—I don't want to finish that statement.

Q. What is the reason you don't want to finish it?

A. It contains language I don't believe is correct to use in front of a lady.

MR. McMAHON: I object to that. I appreciate the sensitivity. I am sure we all enjoy the fact he has now gotten into the record a damaging remark.

TRIAL EXAMINER MAHER: I direct the witness to complete the conversation, and I am sure the sensitivity of the reporter will be—

A. He stated that he was going to make Mr. Wampler and company eat shit.

Q. (By Mr. Naimark) Is Simmons, Charles Simmons, an employee of Carrier?

A. He is.

Q. Were other employees present when this took place?

A. There were two. The two men from the shipping area who were inside of the car, inside of the vehicle.

Q. Who is Mr. Wampler?

A. Mr. Wampler is the chairman of the Board of 250 Directors of Carrier Corporation.

251 MR. NAIMARK: No further questions.

TRIAL EXAMINER MAHER: I think that it would be to the advantage of everybody, including Counsel, if we took a recess at this time. Ten minutes.

(Short recess.)

252 TRIAL EXAMINER: On the record.

MR. McMAHON: Mr. Trial Examiner, I direct the

Trial Examiner's attention to the charge filed in this matter. I believe 3-CB-439 and similarly 3-CC-106 were filed, the 3-CB-439 was filed on March 14, 1960, and the 3-CC-106 was filed on March 14, 1960. And each of them allege that—the 3-CB alleges on March 7th and March 11th, and the 3-CC refers to matters that occurred on March 11, and I move that all testimony relating to incidents prior to March 7 be stricken from the record as beyond the scope of the charge and beyond the scope of the pleadings.

TRIAL EXAMINER MAHER: Viewing, as I do, and as the Board does, a charge filed pursuant to Section 10 (b) as a document intended primarily for the initiation of proceedings before the Board and not in the strict sense the pleadings, I do not consider that the Regional Director and the General Counsel, for whom the Regional Director acts in the issuance of complaints, I do not believe them to be bound by the limitations of the charge in this or any proceeding coming before the Board. Accordingly, I will deny your motion.

CROSS EXAMINATION

Q. (By Mr. McMahon) Sheriff, on—Let me ask this question:—

MR. NAIMARK: Captain.

Q. (By Mr. McMahon) Did I say "Sheriff"? Ex-253 cuse me. Captain. Captain Wood?

A. Yes, sir.

Q. Captain, have you given any statements to General Counsel or the Regional Director or Mr. Naimark?

A. No, sir.

Q. And do you recall being here in this courtroom on April 8th?

A. Yes, sir.

Q. And you didn't tell us anything at that time about Leslie Carver or any of these other matters that we are now talking about?

A. That is correct, sir.

Q. It is correct that you did not.

A. That I did not. That is right.

254 Q. Yes. May I have General Counsel's Exhibit No. 2? I show you General Counsel's Exhibit No. 2 in evidence, Chief Wood, and this has been identified as a clear representation of the railroad entrance to the property, looking from west to east?

A. That is correct.

Q. And you would say the same?

A. Yes, sir.

Q. And, Sheriff, I direct your attention to the gate—

A. Yes, sir.

Q. And there is a padlock on that gate?

A. Yes, sir.

Q. And you say that the Carrier employees have certain—from time to time certain of the guards under your direction have keys?

A. They have master keys which fit all of the locks within the Carrier perimeter.

255 Q. Now, I show you this fence, Chief Wood, that runs east and west, and south of the railroad track, north and south?

A. That is right.

Q. I show you this road, do you know the name of the road, sir?

A. There is no name to it. It is the entrance to the Western Electric parking lot behind Brace, Muller and Huntley property.

Q. This fence runs parallel to that road, to that parking lot?

A. Yes.

Q. And now do I understand that easterly down the track, there is another gate that would open?

A. There are three more gates, three more gates on the railroad siding that are all controlled by the same combined padlock so one key opens all three padlocks.

Q. And people working under your control and direction have that key?

A. That key, the individual key itself is in the hands of the railroad. The—

Q. The master key?

A. The master key fits all four locks, yes.

Q. And who gave the key to the railroad? Not the person, but was it Carrier?

A. Carrier, yes, sir.

Q. Well, now, Mr. Naimark asked you if your 256 ployees used this land across this railroad track?

A. Yes, sir.

Q. I am showing you, and do your guards ever patrol and inspect those locks from time to time?

A. Yes, the gates are inspected.

Q. Sheriff, your personnel working under you had the use of this master key and could open the padlock and thus open the gates that would open onto the Western Electric or Brace, Mueller Company property; is that correct?

A. That is correct, although the Brace, Mueller and Huntley gate opens onto Western Electric property, the road they have to cross to get onto their property, that road indicated in that picture.

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257 Q. But how long in respect to—

A. Thirteen years.

Q. In respect to plant security?

A. Thirteen years.

Q. And with respect to this key, the master key and opening and closing the gates, has that been the practice all that time?

A. Yes.

Q. You have had the master—

A. Yes.

Q. To all those locks?

A. Yes. The railroad did not, when I first went to work there.

Q. The railroad did not have the key?

A. No, sir.

Q. Do you recall the year that the railroad was given the key?

A. I believe it was either 1949 or 1950 when—

Q. Well, just the year.

A. I would like to correct that last statement if I could.

It was after the Korean conflict was over.

258 Q. It was after the Korean conflict was over?

A. Yes.

Q. Railroad personnel were given keys to that gate?

A. Yes, sir.

Q. Some time in '52 or '53?

A. Yes, sir.

Q. And that was approximately seven years ago?

A. Yes, sir.

Q. And so to your knowledge of the 13 years covered, for six years the sole keepers of the keys were the Carrier employees employed in the plant security personnel department?

A. That is correct.

Q. And they had the key to the Thompson Road entrance and the other spur gates?

A. Yes. Those entrances the locks were all combined the same as the main entrance key.

Q. So I stated awkwardly, but the keys to that lock, to the Thompson road entrance, will open the padlocks to the other entrances?

A. It would open any entrance lock at Carrier.

264 Q. Would you get hold of that (referring to General Counsel's Exhibit 9). This is somewhat repeti-

tious. I just want— This is General Counsel's No. 9, and I thought we could perhaps locate those other gates. Would you point to them?

A. This is the Brace-Mueller and Huntley gate that runs across the Western Electric road into the Brace, Mueller and Huntley property. The Western Electric spur is over here at this point here with the jog in it.

Q. They are properly indicated then on this plot plan and it is those gates to which your employees held the master key?

A. Yes, sir.

Q. As a matter of fact, were the sole possessors of the key up until some time after the Korean war, which we will fix as some time in 1953?

A. Yes. This was put on some time in that period. This entrance here was added onto the spur.

Q. And this fence that we are talking about now is south of the railroad tracks?

A. That is correct.

Q. And where is it with regard to this road that 265 appears on General Counsel's No. 2?

A. This road?

Q. Yes.

A. This is the Western Electric Road here that runs from Thompson Road back past the Brace, Mueller & Huntley property, past the railroad entrance and goes up a slight grade at that point into this parking area now being used partly for storage by Western Electric.

Q. So the fence would be south of the railroad tracks?

A. But north of this road.

Q. Sometimes called the Western Electric right-of-way?

A. Yes, sir.

Q. On March 11, at about 2:40 o'clock in the afternoon, Chief Wood, you said you were standing inside the gate?

A. Yes, sir.

Q. And who was with you?

A. Some 16 guards and monitors, 16 people.

TRIAL EXAMINER MAHER: What gate were you standing in front of?

THE WITNESS: The railroad gate.

Q. (By Mr. McMahon) Now, you say they called you a scab?

A. They called the group of us scabs.

Q. And they were all guards?

A. No, sir, guards and monitors.

Q. Well, what are monitors?

266 A. They are people that work for Carrier who were on hand at the time of the train going out.

Q. Well, what are the functions and duties of a monitor?

A. I do not know.

Q. Are they members of plant security personnel?

A. No, sir.

Q. Were they supervisory employees?

A. Salaried personnel.

Q. I have no further questions at this time. Well, let me ask about how many people of these people were monitors?

A. I don't know. I couldn't tell you offhand. I would have to check my records, see?

Q. Well, give us it approximately. How many were you there altogether and how many were monitors?

A. There were approximately 16 people and approximately 6 of them being monitors and 10 being guards.

Q. Well, how did the word monitor—where did it come from?

A. That is what I have heard them referred to, as monitors.

Q. When was the first time you heard about this?

A. When the strike began.

Q. And they were then assigned to the plant security department?

A. They have nothing to do with plant security whatever.

Q. Well, do they work with the people in plant security?

A. No, sir.

267 Q. What were they doing on that particular day?

A. They were at the location.

Q. Doing what?

A. Viewing what went on, taking pictures.

Q. Oh, I see. They had cameras?

A. Yes.

Q. Tape recorders?

A. I don't know if they had tape recorders. They had cameras.

Q. And they were taking pictures of the picket line and that sort of thing?

A. Taking pictures of the activity that was going on.

Q. Were they moving pictures?

A. Some were moving pictures, and some were still pictures.

269

REDIRECT EXAMINATION

Q. (By Mr. Naimark) You testified, I believe, that the keys at a time prior to 1952 were not given to the railway?

A. That is correct.

Q. What was the reason for that?

A. Secure the requirements by the United States Government due to contracts that we were performing within the confines of the plant.

Q. Second question: Brace, Mueller and Huntley, and Western Electric plants, do you know when they were built?

A. I believe that the Western Electric plant was built after 1952. The exact year I am not certain.

Brace-Mueller and Huntley plant was already constructed when I went to work at Carrier.

270 MR. McMAHON: I would move to strike out all of the Captain's testimony with respect to any threats or implications made on March 11, and allegedly shouted

inside the gate because they were not directed to employ 271 ployees as alleged in the pleadings, but directed to guards, or more particularly to salaried employees who were not employees within the definition of the Act.

TRIAL EXAMINER MAHER: I will take the motion under advisement and rule on it at the appropriate time.

Please raise your right hand.

JOHN DIEHL, a witness called by and on behalf of the General Counsel, being first duly sworn, testified as follows:

TRIAL EXAMINER MAHER: Please be seated and give your name to the reporter.

THE WITNESS: John Diehl, 515 Beverly Road, Syracuse, New York.

DIRECT EXAMINATION

Q. (By Mr. Naimark) Mr. Diehl, by whom are you employed?

A. Carrier Corporation.

Q. And how long have you been employed by them?

A. Since March, 1952.

Q. And what is your position there?

A. Laboratory technician.

Q. In addition to being a lab technician, do you do any work involving photography?

A. Yes, sir.

Q. In connection with the strike which we referred to here, were you given an assignment to take photographs or pictures of the strike?

A. I was asked to, if I would document the labor disputes at Carrier at that time.

Q. And when did you start doing this?

A. The day after the strike, sir.

Q. What type of pictures did you take? Were they stills or moving pictures?

A. Stills.

Q. Directing your attention to March 11, 1960, were you on assignment at the railroad tracks engaged in taking pictures?

A. Yes, sir.

Q. Where were you with relation to the track and the fence, or the gate, excuse me, the gate inside or outside?

A. Well, when I arrived there I was on the inside of the gate.

Q. And will you tell us whether you observed any of the pickets that were present there at the time?

A. Yes, sir.

Q. Did you recognize any of them?

A. Yes, sir.

Q. Approximately how many pickets were there?

A. When I first arrived there we were in a car and there were possibly four or five and then they kept multiplying and coming from other gates.

273 Q. What time did you first arrive?

A. Probably in the vicinity of 11:30 or 12 o'clock.

Q. And then later on approximately how many pickets were there?

A. In the neighborhood of around thirty.

Q. Did you see any identification signs with respect to the Steelworkers Union?

A. Yes, sir, they had buttons on.

Q. And what did the buttons—what did they look like?

A. Round, white buttons with blue lettering and with "United Steelworkers of America".

Q. And any other signs that you recall?

A. There was a sign on the snow bank out in front.

Q. What did that say, if you recall?

A. Well, the top of the sign was ripped off and it just said "On strike, United Steelworkers of America."

Q. Do you know Mr. Louis Hosid?

A. Yes, sir.

Q. Is he an employee of Carrier?

A. Yes, sir.

Q. Was he there at the time?

A. Yes, sir.

Q. Was he wearing one of these buttons?

A. Yes, sir.

Q. Did he have any conversation or did he say
274 anything to you at the time?

A. When I first arrived there?

Q. No, any time on March 11?

A. Oh, yes, sir.

Q. Will you tell us the circumstances of what he said?

A. Well, I was taking pictures of the train coming through and the pickets and the tracks and the men opening and closing the gates, and the disturbance going on, and he turned around and recognized me. He was with Les Carver at the time, and they forced me off the snow bank that I was on and about 15 of them grouped around me, and Lou Hosid told me if I showed any of those blankety-blank pictures to any Carrier employees or officers, that he would get me later, it wasn't over yet, he would find out where I lived and they were all calling me names and hollering at me, and as they were surrounding me there in front of the Sheriffs' car, one of the sheriffs came over and wanted to know what the disturbance was, and Mr. Hosid told the sheriff that I was out taking pictures, and he didn't want his picture taken, and I should be inside the gate with the rest of the employees.

I told the sheriff I was a salaried employee and could take pictures anywhere I wanted to as long as I didn't profit from it, and the sheriff didn't say a word or anything else.

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275

CROSS EXAMINATION

Q. (By Mr. McMahon) Mr. Diehl, you say you are a lab technician?

A. Yes, sir.

Q. And what is your rate of pay? Are you an hourly or a salaried employee?

A. Salaried employee.

Q. What is your salary?

A. About 5400.

Q. An annual salary of 5400?

A. Yes, sir, that is what it amounts to, some few dollars and some cents.

276 Q. How were you paid during the strike?

MR. NAIMARK: I object to this. I didn't hear the first question or I would have objected to that. His salary has no bearing on his testimony here.

TRIAL EXAMINER MAHER: The objection is sustained.

MR. NAIMARK: I move that it be stricken.

TRIAL EXAMINER MAHER: Motion granted.

MR. McMAHON: Well, I am sorry. On direct examination the question was asked of Mr. Diehl whether or not he was a lab technician, and whether or not he did photography and then he said something about documenting the labor dispute. I feel the door has been opened, and I feel I have a right to explore the circumstances under which he was hired and what he was supposed to do and who told him to do what.

TRIAL EXAMINER MAHER: My ruling stands.

Q. (By Mr. McMahon) Now, you say you were asked to document the labor dispute?

A. That is correct.

Q. Who asked you to do that?

A. Mr. Asquith.

Q. Mr. Asquith?

A. Asquith.

Q. Spell that for me, please.

A. To be honest with you, I don't know.

Q. Give it to me phonetically.

277 A. A-s-q—

MR. NAIMARK: A-s-q-u-i-t-h,
q-u-i-e-t-h.

Q. (By Mr. McMahon) What is Mr. Asquieth's position with the company?

A. He is in charge of the research and development, of the research division.

Q. How is he connected?

A. He is personnel man for the research and development division.

Q. What did he say to you?

A. Well, he just called me and seeing that I did photography in the plant for Carrier, photographing their machines and so on, if I would mind documenting the labor dispute that might arise.

Q. Do you recall exactly what he said to you?

A. That was his—

Q. Did he use the words "labor dispute"?

A. Yes, sir.

Q. Did he tell you what he wanted in the pictures?

A. No, sir.

Q. Just to go out and take pictures?

A. Pictures of the fellows on the picket line, and so on.

Q. And you were to be paid for taking these pictures?

A. My regular salary, sir.

Q. So you made the statement "I could take pictures as long as I didn't profit by them"?

A. That is correct.

Q. Well, you were getting paid for taking these pictures, weren't you?

MR. NAIMARK: I object again. This is the same line that he was following before in his salary questions of the witness. What he was getting paid has nothing to do—

MR. McMAHON: I am not so much interested in the amount, but he did say that, he made the statements.

MR. NAIMARK: How does it bear on the issues?

MR. McMAHON: You opened the door to this.

MR. NAIMARK: I did not. I indicated his duties as background. I didn't open any doors to questions regarding salary. Do you want me to ask every witness you put on the stand as to how much money he makes?

TRIAL EXAMINER MAHER: The objection is sustained.

MR. McMAHON: I submit, Mr. Trial Examiner, could I have the testimony of this witness read back at the point where he testified—

TRIAL EXAMINER MAHER: I am quite familiar with the testimony of this witness.

MR. McMAHON: I move that—

TRIAL EXAMINER MAHER: Please proceed with the interrogation of him.

MR. McMAHON: I move that—Here is the point, 279 perhaps you can help me out. I take the note that he quotes from Mr. Hosid as stating that he didn't want his picture taken, and he said to the Sheriff, and that Mr. Diehl said, his answer "I could take pictures as long as—agreed to—so long as I didn't do it for profit." Now, I think it is appropriate for me to show that he did convey

the civil rights of Mr. Hosid as provided by the Civil Rights law of the State of New York because he was profiting by taking those pictures, and also I think to show his bias and prejudice, and I ask that you reconsider your ruling.

TRIAL EXAMINER MAHER: Bias and prejudice in what respect?

MR. McMAHON: It shows his bias and prejudice in the pictures which he took, and they were preserved.

TRIAL EXAMINER MAHER: Have you made a motion to strike the testimony?

MR. McMAHON: I ask first that you reconsider your ruling and permit me to explore on cross examination those matters that were developed on direct examination.

TRIAL EXAMINER MAHER: I have reconsidered my ruling, and I will permit you to develop matters that were —to develop matters that were raised on direct examination.

The material which you are now pursuing was not raised on direct examination, and I direct you now to proceed with the interrogation on other matters.

280 Q. (By Mr. McMahon) Did you give a statement to Mr. Naimark or any of the other members of the National Labor Relations Board?

A. I answered questions, yes, sir. Whether they took notes on that I couldn't tell you.

MR. McMAHON: May I have the statement?

(Mr. Naimark presents statement to Mr. McMahon.)

283 Q. (By Mr. McMahon) You stated in this state-

ment that Mr. Pond wanted closeups of the congestion at the gate which is illegal. Who is Mr. Pond?

MR. NAIMARK: I object. There is no foundation laid for any testimony with respect to the statement. He is not impeached, no prior inconsistent statements. There is no basis for it.

TRIAL EXAMINER MAHER: The objection is sustained.

MR. McMAHON: I submit that a Mr. Pond—it is made subject to showing that—to contradict his answer to 284 me on cross examination that he was just supposed to go out and take pictures, I now submit that he stated in the statement under oath "Mr. Pond wanted closeups of the congestion at the gate which was illegal so I moved up"—

TRIAL EXAMINER MAHER: If you want it in the record, proceed with it.

Q. (By Mr. McMahon) Were you told to get pictures that showed illegality in some form or another?

A. From time to time, yes, sir.

Q. And who gave you those instructions?

A. Mr. Pond gave me those instructions.

Q. Who is Mr. Pond?

A. I don't know his title, but he is in charge of insurance, and so on, at Carrier Corporation.

Q. And had you had experience in this sort of thing before?

A. No, sir.

Q. And had someone given you indications of the type of pictures that they wanted other than Mr. Pond?

A. No, sir, not that I can remember.

289 Q. What were your hours of work while you were taking pictures?

A. They varied.

Q. From what to what?

A. 6:30 in the morning, six o'clock in the morning until a quarter to five, five o'clock, 5:30.

Q. And how would they vary, would someone call you and tell you when they wanted you to get pictures?

A. No, sir. We were told to report so we would be there.

290 Q. By whom were you told?

A. Mr. Iles or Mr. Asquieth.

Q. Mr. Iles, one of the company attorneys, and Mr. Asquieth of the personnel department?

A. That is correct.

Q. They would call you at home and tell you to get up—

A. No, we were told when we went home that night.

Q. What time to report the next day?

A. Yes, sir, that is correct.

Q. What were your hours of work on March 11?

A. The usual time, 6:30 in the morning.

Q. Were there times when you performed your duties as a lab technician?

A. No, sir.

Q. From March 3rd you were strictly taking pictures?

A. That is correct?

Q. And about how many pictures a day did you take?

A. That I could not answer honestly.

Q. Did you take pictures every day?

A. Every day, sir.

Q. Were there many times when there was nobody—
it was quiet and nobody was shouting at all?

A. When nobody was shouting?

Q. Yes.

A. I can't remember any time during the day out-
291 side of Sunday. I didn't take pictures on Sundays,
just six days a week.

Q. Any days after March 16 did you take any pictures
of the railroad entrance?

A. After? Yes, sir.

Q. Do you have any of those with you here?

A. Not on me, sir, no.

Q. What did you do with these pictures that you took?

A. Turned them over to the man that I worked under.

Q. And who is that?

A. Well, Mr. Gordon Dinger.

Q. Who is Mr. Gordon Dinger?

A. Manager of National Displays at Carrier.

Q. Who else did you work under?

A. Well, I worked directly under him and his orders
I believe came from Mr. Iles and Mr. Asquieth, but I re-
ceived my orders mostly from Mr. Dinger.

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293

FRED CHAMBERLIN, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER MAHER: What is your name, please?

THE WITNESS: Fred Chamberlin.

TRIAL EXAMINER MAHER: Chamberlin?

THE WITNESS: Right, sir.

TRIAL EXAMINER MAHER: Home address.

THE WITNESS: 114 Edtin Road, Syracuse, New York.

DIRECT EXAMINATION

Q. (By Mr. Naimark) Mr. Chamberlin, by whom are you employed?

A. Carrier Corporation.

Q. And what is your position with Carrier?

A. I am a development engineer and absorption engineer.

Q. How long have you been working there?

A. Approximately three months.

Q. Directing your attention to March 7th, 1960, were you working for the company then?

A. Yes, I was, approximately one month.

Q. And did you have occasion to come to work on that day?

294 A. Yes, I did.

Q. What time did you report for work?

A. Eight o'clock.

Q. And which gate did you come in?

A. The main gate.

Q. Is that gate 1?

A. I don't know the number offhand.

Q. Where is it located, on what street?

A. It is there by the reception office on Thompson Road.

Q. And when you arrived at work, did you see any pickets there?

A. Very many.

Q. Approximately how many?

A. Well, there was an awful lot of them, I would say a conservative at part of the gate where I went in, sixty or seventy.

Q. Did they have any identification?

A. I didn't look, I didn't notice.

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295 Q. (By Mr. Naimark) Can you tell me whether or not you—

A. Some of them were carrying signs saying "We are on strike."

Q. And you recognized any of the people who were there?

A. Well, I did, one, that was Mr. Kowalski.

Q. Well, John Kowalski?

A. That is right.

Q. And did you go through the plant, did you go through the gate?

A. No, I started to go through the picket line and one of the pickets stopped me and asked to see my badge. I pulled out a badge which was the temporary badge, and he talked to some of the fellows behind him and said "Hey, fellows, this guy has a temporary badge." And then he said to me "We can't let you through." I asked to see whoever was in charge, and he pointed in a northern direction and said "That is John Kowalski over there." I didn't see him right at first, and I said "Where?" So he took me over, and he said "Hey, John, this fellow has a temporary badge." So then I explained to Mr. Kowalski that I had been there approximately a month and was an engineer and I wanted to go to work.

He hesitated for a moment and then said "No", and there were so many pickets that didn't exactly have 296 a friendly attitude, so I decided it would be foolish to attempt to go to work, so I went back the other way.

MR. NAIMARK: That is all. No other questions.

CROSS EXAMINATION

Q. (By Mr. McMahon) What were the temporary badges?

A. Well, when a new employee starts they give a temporary badge, a permanent badge has your picture on it and I didn't receive any permanent badge yet.

Q. Now, this was on what day, March 7th?

A. That is right.

Q. Had you gone to work on March 3rd, 4th, 5th and 6th?

A. No. The 3rd and 4th, let's see. The 3rd and 4th,

that was Thursday and Friday, but not Saturday and Sunday.

Q. On the 3rd and 4th did anyone ask to see the temporary badge?

A. They asked to see the badge Thursday—they struck Wednesday night. Thursday was the next day they weren't too well organized and didn't ask to see the badge, and Friday they did.

Q. And you showed your badge?

A. Yes.

Q. And you went in to work?

A. Yes.

Q. And would your badge indicate which job you held in the corporation?

Q. 297 A. Yes, that I was a salaried employee, exempt was written on it, and gave my picture.

Q. Did you have one with you?

A. I have a permanent badge now.

Q. Can I see it?

A. My permanent badge, certainly.

Q. Yes.

(Witness presents badge to Mr. McMahon).

Q. What is this, 0 5340?

A. That is my number.

Q. Is there anything on here by looking at this you could tell if you were a salaried or hourly rated employee?

A. The color.

Q. Which is—

A. White.

Q. White?

A. Yes.

Q. And how are the hourly rated employees?

A. I don't know this.

Q. And this temporary badge—thank you. This temporary badge—

TRIAL EXAMINER MAHER: For the record show that the witness displayed to Counsel a plasticized badge with a picture with a white background and the witness's personnel number which was otherwise identified in the record.

298. Q. (By Mr. McMahon) And the legend "Carrier" appears.

This temporary card was it, Mr. Chamberlin?

A. No, it is a badge, plastic covered. It is a card with your name written on it, the word "Exempt" meaning I am a salaried employee.

Q. That is the word I was getting at, the word Exempt.

A. The pickets knew I was a salaried employee when I went through Friday because one of them asked me to see it, and said I was a salaried employee.

Q. The word "Exempt"—

A. I imagine that is how he knew.

Q. How long was your conversation with Mr. Kowalski, did you say?

A. Very short. I told him I was an engineer and had

been working there approximately a month and asked if I could go to work, and he said No.

Q. You recognized Mr. Kowalski?

A. I sure do.

Q. And what did you say the pickets carried signs and you volunteered the legend on the signs, what was it?

A. Something to the effect "We are on strike". I saw enough of it to realize it was the Steelworkers sign. I can't remember what it said.

Q. Did Carrier appear on it?

A. I can't remember. At the time I recognized it 299 as signs being carried by the pickets.

Q. And Carrier?

A. And Carrier; that is correct.

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Q. Did you receive any instructions from Mr. Wampler or Mr. Bynun about displaying your identification badge on entering the plant?

A. I was told by my supervisor that we would cooperate and not to — — they asked to see our badge we were to show it to them, and try not to cause any incidents.

Q. And this instruction had come from — —

A. My supervisor, that is all I know.

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300 JOSEPH PUCHALSKI, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

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301 FRED CHAMBERLAIN, a witness called on behalf of the General Counsel, having been previously duly sworn; was recalled and testified as follows:

CROSS EXAMINATION (Continued)

Q. (By Mr. McMahon) Mr. Chamberlin, to whom did you give this statement which was handed to me by General Counsel?

A. His secretary. I don't know who she was.

Q. Whose secretary?

A. I don't know.

Q. And will you tell us the circumstances under which you gave the statement?

A. All right. After they didn't let me through I was a little bit mad, and I went back across the road and there were Carrier employees over there, and I had seen him, I didn't know his name, but I had seen him and he said "Wouldn't they let you through?" And I said "No, they wouldn't." He said "Would you like to make a statement?" I said "Yes, I would," so he told me to go over to the Sheraton Hotel and there I saw Mr. Greene.

Q. Who?

302 A. Mr. Greene, I believe there, and he was there and asked me if I would like to make a statement, and I gave the statement and the Secretary took it. I don't know who she was.

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JOSEPH PUCHALSKI, (resumed the stand).

DIRECT EXAMINATION

Q. (By Mr. Naimark) Mr. Puchalski, by whom are you employed?

A. By Carrier Corporation.

Q. What is your status, what is your job?

A. I am an industrial engineer.

Q. And how long have you been employed?

A. Twenty months.

Q. Directing your attention to March 3, 1960, were you employed at that time?

A. Yes, I was.

Q. And did you report to work on that day?

A. Yes, I did.

MR. McMAHON: May I have the day, please.

Q. (By Mr. Naimark) March 3rd. What time did you get to work?

303 A. 7:30 in the morning.

Q. What gate did you enter?

A. The rear gate, that would be I believe gate 4, the gate near to the railroad entrance. Is that gate 3?

MR. GREENE: The south gate?

THE WITNESS: Yes, the south gate.

.

Q. (By Mr. Naimark) What did you observe when you came to work that day?

A. There were three to four pickets at that rear gate. One of them I recognized as Kenny Lyons.

Q. And did you notice any identification signs?

A. They all wore the familiar white button, or white and blue button which identified the steelworkers.

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304 Q. (By Mr. Naimark) You are a salaried employee, as I understand?

A. An exempt salaried employee.

Q. All right. On March 3rd, you saw Kenneth Lyons?

A. Yes.

Q. And he is an employee?

A. He was an employee prior to the strike.

Q. Did he speak to you at that time?

A. He had spoken to me and possibly two other salaried workers who were going through the gate, asking us for identification which was "Show me your badge" and words to this effect.

Q. What did you do?

A. I showed him my badge.

Q. Then what happened?

A. I went through the gate.

Q. Now, directing your attention to March 11, were you at the main gate?

A. I was at the main gate at approximately five minutes past three, well, say a quarter after three, somewhere in this vicinity, I don't know exactly.

Q. Were there pickets there?

A. There were approximately 25 to 35 pickets who had obstructed my entry into the plant. Two of the pickets I had recognized, one as being Frank Brewster and the other which I later identified as Sherman.

TRIAL EXAMINER MAHER: As who?

THE WITNESS: Sherman. I don't know the name.

Q. (By Mr. Naimark) Jay Sherman?

A. It is the man that sat in the center of the courtroom here with the blue jacket. I have seen him at Carrier, and he was working there. I personally don't know him, though.

Q. Did you have a conversation with Mr. Brewster any time on March 11th?

A. Yes, I tried to enter the plant at this time.

Q. How did you try to enter?

A. I was driving south on Thompson Road, and I turned left at the plant entrance and I was blocked by approximately seven to possibly ten pickets who stood in front and on the side of the car. And at first I made a motion—I heard some voices saying that "You can't get in here", and I made a motion that I wanted to turn around on Carrier's apron because my car's rear end was sticking toward the highway. I didn't want to back across the highway, I wanted to turn around and pull back across the highway, and Champucini, who was a monitor—

306 **Q.** Did Francis Brewster say anything to you?

A. Yes, he did. It was approximately probably a quarter minute to one-half minute after Sherman had spoken to me and said "You got the light, go ahead now." And I went to back across the highway into Carrier's main parking lot, which is the west lot.

Q. Did Francis Brewster say anything with reference to your entering the plant?

A. No, I couldn't identify that. It was just a conglomeration of voices. Sherman did tell me—and this is not verbatim, this is just the impression of the talk that I have

now, that Carrier pulled something on us and we are not letting anybody in.

MR. NAIMARK: No further questions.

CROSS EXAMINATION

Q. (By Mr. McMahon) When was the time Sherman is supposed to have said this?

A. My guess is between 3:05 and 3:15. I have to back-track a minute.

Q. And this is on March what?

A. March 11.

Q. March 11, at the main gate?

A. That was at the entrance of the main gate.

Q. And when did you convey this information to Mr. Naimark?

A. Why, as an affidavit or as this information? I 307 don't understand your question.

Q. I want when you gave the affidavit.

A. My affidavit was given within an hour of the time of the incident.

Q. To whom did you give it?

A. I had given it to a secretary whom I know, but I believe her name is Kathleen. I seen Mr. Greene there at room three—

Q. The counsel at the counsel table?

A. Yes, Room 300 in the Sheraton Motel.

Q. (By Mr. McMahon) Mr. Puchalski, this statement

says that you went there to see Mr. Champucini who was one of the monitors.

A. Monitors across the street.

Q. And you asked him if he were the monitor?

A. Yes, I did.

Q. Had you received prior instructions that if anything happened you were to see a monitor?

308 A. Yes.

Q. Who gave you that instruction?

A. My supervisor, Joseph Lupa.

Q. What was the general nature of the instruction?

A. That if I was to be denied entry into the plant report to the nearest monitor, and they would give me instructions what I was to do.

Q. And your instructions were to report to the Sheraton Motel and to Room 300?

A. 300 or 301.

Q. You did follow instructions?

A. Yes, I did.

Q. And who was present at room 301?

A. I can't recall anybody other than Mr. Greene and I believe Mr. Pond. There were other people, but I don't know them.

Q. Who is Beatrice Leiger?

A. I believe she was one of the secretaries that I gave my statement to, my affidavit to.

Q. Did Mr. Greene or Mr. Pond ask you what happened, before you gave the statement?

A. No, they asked me if I came to make an affidavit.

Q. I see.

A. And I said I did come for this reason.

309 Q. (By Mr. McMahon). Do you have your identification with you now, Mr. Puchalski?

A. Yes, I do.

Q. And this is the same one you had on March 3rd?

A. Yea. (Presents to Mr. McMahon).

Q. And will it be sufficient for the record to show 310 it is the same one as Mr. Chamberlin showed, except that this one is in a leather case?

TRIAL EXAMINER MAHER: That will be adequate.

Q. (By Mr. McMahon) Had you received instructions to show your identification card to the pickets?

A. Yes, from my supervisor.

Q. What were the nature of the instructions?

A. As I had said previously that if I was denied entrance into the plant — — I am sorry. May I retract that. If I was asked for identification, to show my badge, and if I was denied entrance to the plant, seek the nearest monitor.

320 MR. NAIMARK: I have agreed with Counsel for the Union that there is one correction that can be made at this time.

In Paragraph V and VI of the complaint it was alleged that Jay Sherman was Secretary of Local 5895 of the Steelworkers. This was admitted in the Answer, and I understand throughout that Jay Sherman was not secretary, but that he was Chairman of the local Grievance Committee of Local 5895, and I would like to amend the complaint in that respect.

TRIAL EXAMINER MAHER: Is that agreeable with Counsel?

MR. McMAHON: It is agreeable.

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323 GORDON DINGER, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER MAHER: Please be seated and give your name and address to the reporter.

THE WITNESS: My name is Gordon Dinger, 214 Hoffman Road, Syracuse 7, New York.

TRIAL EXAMINER MAHER: By whom are you employed?

THE WITNESS: By Carrier Corporation.

MR. McMAHON: Spell it.

MR. NAIMARK: D-i-n-g-e-r.

DIRECT EXAMINATION

Q. (By Mr. Naimark) How long have you been employed by them, approximately?

A. Oh, approximately six or seven years.

Q. And what is your position?

A. I am display manager.

Q. Do you also do any other work other than that?

A. Yes, I do. I occasionally do photographic work for the company.

TRIAL EXAMINER MAHER: I can't hear you, Mr. Dinger.

THE WITNESS: I occasionally do photographic work for the Company.

Q. (By Mr. Naimark) And in connection with the strike which we have referred to in this hearing, were you on duty to take pictures of that strike?

324 A. I was.

Q. And when did you commence taking those pictures?

A. Within a day or so following the walkout.

Q. What type of pictures were they, stills?

A. I was taking moving pictures.

Q. And for how long a period did you continue taking pictures, approximately?

A. I continued up until the middle of April or toward the end of April.

Q. Directing your attention to March 11, 1960, were you on assignment taking pictures at that time?

A. I was.

Q. And where was this?

A. At the New York Central Railroad gate, at the southwest corner of our main property at Thompson Road.

Q. About what time?

A. Well, I was there probably about 10:30 and I left about, oh, some time after 2:30 or so.

Q. Now, during the time you were there, did you see the pickets that were there?

A. Yes, I did.

Q. And approximately how many?

A. Well, they numbered from four to some place between forty or fifty and sixty.

325 Q. What do you mean by numbered from four to forty?

A. When I first arrived there were four or five picketing and at the height of the incident out there there was some place between forty and sixty in the mob. I couldn't tell you.

Q. Were there any officials or representatives of the Union present that you know of?

A. Yes.

Q. And who was there that you know?

A. Officials of the local that were there that I recognized were Francis Brewster, John Kowalski, the District Representative, I saw there. I saw Albanese, I saw there. I am not sure who are officials of the Union, but those three I know to be officials of the Union.

Q. Did you see Mr. Kowalski arrive?

A. I did not see Mr. Kowalski arrive.

Q. Was Jay Sherman there?

A. Yes, Jay Sherman was there.

Q. Now, while you were there, did you take pictures at that time?

A. Yes, I did.

Q. And where did you take these pictures?

A. I stood inside the railroad gate and shot pictures of the surrounding area. Twice during the afternoon I stepped out onto Thompson Road and shot movies. I would say in the general area of the railroad gate.

326 Q. Did you have any conversation or did Francis Brewster say anything to you while you were there?

A. I did not have a conversation with, but Francis Brewster among others, spoke to me.

Q. Well, what did he say to you?

A. Mr. Brewster at one time came up to the gate and told me to come outside and he would "fix me up" out there.

Q. Were those the words that he used?

A. No. At one time he used a bit of profanity that indicated to the effect that he would beat me up for taking pictures.

Q. And was Louis Hosid there?

A. Yes.

Q. And did he say anything to you?

A. Yes, Mr. Hosid did. Mr. Hosid also invited me off the premises and he would beat me up or kill me.

Q. I didn't hear that.

(Last answer read.)

Q. Was Kenneth Lyons there?

A. Yes.

Q. Did he say anything to you?

A. He made some passing remarks, yes.

Q. Well, what were they?

A. Along the same line, to step off — —

Q. Be more specific.

A. Well, he too asked me to come out.

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327 Q. (By Mr. Naimark) You testified that Mr. Lyons commented or said something along the same line. Now, can you tell us in more specificity what it is he said?

A. Well, there was one occasion when there were quite a group of pickets right up close to the gate and that Mr. Lyons among them were each yelling at another camera man and I to come out — —

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328 MR. NAIMARK: It is the witness who was doing the talking. Do you want to have it read back? Read it back?

(Last Answer read.)

A. Yes. They were indicating their displeasure at our taking their pictures.

Q. (By Mr. Naimark) Just tell us what was said.

A. Lyons was kind of seconding the motion of what Hosid — —

MR. McMAHON: I object to this, if the Trail Examiner please.

A. (Continuing) What Hosid and Brewster had said to me.

Q. (By Mr. Naimark) What did he say, if you recall?

A. I said I cannot recall the exact words of Mr. Lyons.

TRIAL EXAMINER MAHER: As best you recall, tell us what he said?

A. That he too would beat me up or take the camera away from me if I would come out.

TRIAL EXAMINER MAHER: Mister — —

MR. McMAHON: I move that the testimony be stricken as being uncertain and not binding on Mr. Lyons here or Mr. Brewster.

TRIAL EXAMINER MAHER: The motion is denied.

Q. (By Mr. Naimark) Was anything done by the pickets?

A. Yes. At one time — — Do you mean by done, something physically done?

Q. Yes.

A. Other than something said?

Q. That is right.

A. At one time Mr. Hosid rushed up to me at the gate with a — — oh, one by two, they looked like the handle of a file, and swung it, and another time one of the pickets threw a chunk of ice at another cameraman and I. That happened more than once.

Q. Subsequent to that time, did you have occasion to be 330 at gate 1 taking pictures?

A. Yes, I have.

Q. And when approximately was that?

A. Well, I have been at gate 1 practically every day from the time I started until I secured — —

Q. Now, between March 11 and April 4 were you at gate 1?

A. Yes, I was.

Q. And during this time there were there pickets?

A. Yes.

Q. And was David Halstead there?

A. Yes.

MR. McMAHON: Mr. Trial Examiner, again, at the risk of interrupting, I am placing a formal objection. We have now a period some time between March 11 and April 4, and we now are going to ask about a specific individual, and I submit that to lay a proper foundation we ought to fix the proper date somewhere more closely than about thirty days, in order to permit Respondents to properly respond and prepare their defense.

MR. NAIMARK: Well, in order to meet this, we have alleged at this point — —

MR. McMAHON: Could I have the Trial Examiner's ruling?

TRIAL EXAMINER MAHER: I want to hear from General Counsel.

MR. NAIMARK: We have alleged it took place between

331 March 11 and April 4, but I will try for the purpose of the record to fix it a little closer.

TRIAL EXAMINER MAHER: Your objection is held in reserve until the correct time.

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333 Q. (By Mr. Naimark) Mr. Witness, I show you a calendar. I will withhold the offer of proof for a moment, but I show you a calendar of 1960, and I ask you to look at it and tell me whether this refreshes your

334 recollection as to the date you had any conversation with Mr. Halstead?

A. I would say it was April 4 or 5.

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MR. McMAHON: I submit that we should now try to get the time of day, at least as far as we can fix it in the morning or the afternoon, and I object at this late date to even — — If we are talking about, Mr. Trial Examiner

— —

TRIAL EXAMINER MAHER: I think Counsel can fix it by one question.

MR. McMAHON: I am even objecting to the 4th or 5th.

TRIAL EXAMINER MAHER: I overrule the objection.

MR. McMAHON: I just — — my only reasoning, and I just wanted to state it for the record that here we are talking not about one isolated incident, such as an automobile accident where it would be sufficient to appraise the responding party of some date, to put him sufficiently on notice. Now, this witness has already testified and volunteered the fact that he saw Mr. Halstead on the picket line every day from approximately March 4th up

until the middle of April, and that after great prodding and probing we have it now April 4th or April 5th.

Now, I am sure that voir dire will indicate that this witness has talked to counsel for the company, to counsel for the General Counsel, to other people and certainly at this late date I submit it is improper and a denial of due 335 process to permit what is tantamount to an amend to the pleadings at this time, I see no cause for it.

TRIAL EXAMINER MAHER: I want the record to show that I postponed the hearing one-half hour to permit you to discuss and converse with both witnesses you intend to call.

Do I understand that there is something that you are objecting to, Counsel for the charging party, or General Counsel, to discussing this with witnesses prior to calling them here?

MR. McMAHON: No, I don't, but I want it to appear on the record that with all the resources of the Federal Government and all the resources of all the law firms investigating this thing, day in and day out, from the 2nd of March until the present, with the photographic team and monitor team and all the other teams we have heard about, it seems grossly improper and no proper reason for showing at this time why we should not get a specific time and place of any alleged incidents or conversations to permit respondents to make a defense.

My only point, Mr. Trial Examiner, has nothing to do with interviewing witnesses. It is a wholesome and sensible practice.

TRIAL EXAMINER MAHER: Thank you very much. The objection is overruled.

Q. (By Mr. Naimark) Can you fix the approximate time of day?

336 A. Yes, it was afternoon.

Q. All right. And will you tell us where was this now?

A. This was at the picket area, the area in which the pickets were picketing at gate 1, between the north and the south driveways.

Q. What did David Halstead say to you?

A. He asked me to step across the line with that camera, and indicated that he would beat me up.

MR. McMAHON: I object to the phrase "indicated," and move that it be stricken.

TRIAL EXAMINER MAHER: The objection is sustained, and the motion to strike is granted.

A. That he would beat me up.

Q. (By Mr. Naimark) Did he say that?

A. I can't remember if he used the word "beat you up" or not.

Q. Well, just tell us what can you remember.

MR. McMAHON: I move to have that answer stricken, even though phrased in the negative it radiates an uncertainty, he can't remember if he said "I will beat you up" or not, trying to adopt a perfectly objectionable question of the General Counsel.

A. To which I answered "Are you threatening me?"

CROSS EXAMINATION

347 Q. (By Mr. McMahon) What is your normal employment, a display manager?

A. Yes.

Q. And you have people working under you?

A. No.

Q. In what department do you work normally?

A. Advertising.

Q. Well, who is your immediate supervisor?

A. Leslie M. Beals.

Q. Will you spell that for us, please?

A. B-e-a-l-s.

Q. B-a-l-s?

MR. NAIMARK: B-e-a-l-s.

Q. (By Mr. McMahon) Beals. What is Mr. Beals' title?

A. Director of Advertising and Sales Promotion.

Q. Well, then, you are the display manager?

A. Yes.

Q. I understand you don't supervise anyone?

A. No.

349 Q. And who had given you instructions as to the taking of pictures?

A. Mr. Walter Iles.

Q. Mr. Walter Iles, I-l-e-s? And would you get your

hand away from your mouth so I can hear you? Is it Walter Iles, I-l-e-s?

A. Yes.

Q. Do you know what Mr. Walter Iles' position is with the Company?

A. He is an attorney.

350 Q. And he is the one who had given the instructions as to the taking of pictures?

A. Yes.

Q. Your answer was Yes?

A. Yes.

Q. And when did he give you these instructions?

A. Two or days after the strike started.

Q. By that do you mean either March 3rd or March 4th or March 5th?

A. Yes.

Q. Could it have been March 3rd?

A. No.

Q. Could it have been prior to March 2nd?

A. No.

Q. And what were his instructions to you?

A. Would I take some movies.

Q. Of what?

A. Of the labor dispute that we were involved in.

Q. And did he give you an indication of what he wanted the pictures for or the type of pictures he wanted?

A. He said he wanted me to, among others; to document the activity.

Q. Of whom?

A. Of the striking employees.

Q. And then did he give you instructions as to where 351 you were to take these pictures after you had taken them?

A. As to what?

Q. Did he give you instructions as to where you would take the photographs? That is, after you had performed the photographic feat of taking the film then you would take the film some place, I assume?

A. Yes.

Q. Was it Mr. Iles who told you where to take the film?

A. No.

Q. Who was it who told you to take the film?

A. I don't recall.

Q. Was there a routine that you followed in taking the films some place?

A. Yes.

Q. And what was the routine?

A. To return the exposed film to the Sheraton.

Q. To the Sheraton?

A. Yes.

Q. Motel?

A. Yes.

Q. Where is that located?

A. On Carrier Circle.

Q. And what time of day would you return the exposed film to the Sheraton Motel?

A. It might be any time of day.

352 Q. And did you have regular hours of employment during this period?

A. No, I did not.

Q. In your work as display manager, did you have regular hours of employment?

A. No, I did not.

Q. You just would come in any time of day?

A. Yes, I have a minimum of working hours.

Q. What is the minimum of working hours?

A. My minimum working hours normally are 8:30 in the morning until 5:15 in the evening.

Q. But if you wanted, you could come in at two or work until eleven?

A. No, I did not mean that.

Q. Well, you say you had normal hours of work from eight in the morning until some times in the afternoon?

A. Sometimes I worked seven days a week, sometimes twenty-four, thirty hours at a time.

Q. I see. And what are your normal duties as display manager, what do they normally entail?

A. To plan, design exhibits, supervise the installation, manning and dismantling of same.

Q. What type of exhibits?

A. Industrial.

Q. I have bucolic notions of exhibits. You mean big signs advertising the merits of Carrier Corporation?

A. Yes.

Q. And what type of displays are we talking about?

A. Industrial.

Q. I realize I am very stupid on this subject, the type of displays I know are those mounted in grocery store windows.

A. No, we had none in grocery store windows.

Q. Where would yours be normally displayed?

A. Various trade shows.

Q. I see. Thank you. During the period approximately March 3 to some time in the middle of April, did you plan and design exhibits and supervise their installation and so forth, and so forth?

NR. NAIMARK: I object to the and so forth and so forth. I plead my ignorance now. What does that mean?

MR. McMAHON: May I have the witness's answer read back; today he said something about planning, designing exhibits, and supervises.

THE REPORTER: "To plan, design exhibits, supervise the installation, manning and dismantling of same."

Q. (By Mr. McMahon) Let me rephrase my question. Mr. Dinger, during the period from March 3, 4 or 5, whenever it was when you started your photographic feats to until about approximately the middle of April, did you plan and design exhibits and supervise the installation, manning and dismantling of same?"

A. Yes, in part.

Q. I didn't hear the last part.

A. Yes, in part.

Q. In part? Let's get to the "in part" part. Would you clarify that for us?

A. I designed some.

Q. How many?

A. I don't remember how many.

Q. Do you recall the days on which you did that?

A. No, I do not.

Q. You did it before March 3rd or 4th?

A. Could have been.

Q. Let's get to what we might consider normal for March 5 on. Was there a normal time for starting work?

A. A normal time?

Q. Yes.

A. Are you saying a prescribed time or normal time?

Q. Well, either. Let's start with prescribed, if that seems to be helpful. Was there a prescribed time for your starting work after March 5th?

A. Yes.

Q. What was that prescribed time?

A. Varied.

Q. And who would do the prescriptions?

355 A. I normally do it.

Q. I beg your pardon.

A. I do it.

Q. You decided your own time after March 5. What time you would start to work?

A. Within reason.

Q. Well, who determined what was reasonable or not?

A. Mr. Iles.

Q. Mr. Iles?

A. Yes.

Q. Well, let's start—I don't want to go through every day. Were most days that you started at eight o'clock, or around eight o'clock in the morning?

A. No.

Q. 6:30 in the morning?

A. Yes.

Q. Most days you started about 6:30 in the morning?

A. About.

Q. And the days you didn't start at 6:30 in the morning, what time would you start?

A. A quarter to seven. It would vary.

Q. From what to what?

A. I didn't keep any track.

Q. What was the latest time that you reported for work, reported to work, excuse me.

356 A. I don't recall what the latest time was.

Q. Was it after noon?

A. I don't recall.

Q. Well, who did you report to immediately? When you reported to work at 6:30 on the days that you reported and at a quarter to seven, on the days on which it varied, to whom did you report?

A. Mr. Iles.

Q. And where would that be?

A. At the Sheraton.

Q. And would he give you instructions at that time as to what your duties were for that particular day?

A. Sometimes.

Q. And what were the instructions that he would give you?

A. They would vary.

Q. They would vary from what to what? What was the scope of the variance?

A. The extent of the instructions.

Q. Well, give us some of the instructions that he gave you that you recall.

A. I can't recall any instructions.

Q. Well, just any one of the instructions.

A. I can't recall.

Q. It will be helpful, any little particular you can give us.

357 A. He might say "Go to gate 1 and take some pictures."

Q. Did he sometimes tell you to go to the railroad gate and take pictures?

A. Or "Go to the railroad gate and take pictures."

Q. Do you recall that picture of March 11th?

A. No, I do not recall it exactly.

Q. You testified here about it.

A. I testified that—

MR. NAIMARK: I object to the form of the question as arguing with the witness.

MR. McMAHON: I withdraw the question.

Q. (By Mr. McMahon) Do you recall what time you reported for work on March 11th?

A. Not exactly.

Q. Did you meet with Mr. Iles on the morning of March 11th?

A. I probably did.

Q. Do you recall the instructions that he gave you?

A. Not exactly.

Q. Do you recall whether or not he said "We are going to have a switch in railroad cars out there, I would like you down at the railroad gate to get some pictures"?

A. No, I do not recall exactly.

Q. You did appear at the railroad gate at about 10:30 in the morning on March 11th?

A. Yes.

358 Q. Could it have been at a quarter of seven that morning?

A. No.

Q. Well, how do you recall so vividly that it was about 10:30?

A. So vividly? I had my usual morning coffee about a quarter after 10, and it takes normally about ten minutes and then I went to the railroad gate.

Q. Just happened down there at about that time; is that it?

A. No.

Q. Had you received instructions to go to the railroad gate that particular day?

A. Apparently I had.

Q. Do you recall?

A. No, I do not.

Q. So you either were instructed or you just happened there?

A. I was instructed.

Q. You were instructed there by whom?

A. I say I do not recall.

Q. Was there anyone other than Mr. Iles who gave you instructions?

A. Yes.

Q. And who was that?

A. Mr. Asquith.

Q. Mr. Asquieth?

A. That is correct.

359 Q. And anybody other than Mr. Iles and Mr. Asquieth?

A. No.

Q. Did my learned friend Counsel Greene make suggestions to you from time to time?

A. Frequently, in many years Mr. Greene has made suggestions to me, yes.

Q. Did you find them worthy of enforcement?

MR. NAIMARK: I object to the form of the question.

TRIAL EXAMINER MAHER: Sustained.

Q. (By Mr. McMahon) Did you follow the suggestions Mr. Greene made?

A. What suggestions?

Q. Didn't you tell me he made suggestions to you?

A. Yes, in the past he had.

Q. Do you recall some of the instructions from—that that Mr. Greene gave to you?

A. Mr. Greene has never given me instructions.

TRIAL EXAMINER MAHER: I don't hear you.

A. Mr. Greene has never given me instructions.

Q. (By Mr. McMahon) I realize he is a very gentle man. Did you follow any of the suggestions that Mr. Greene made.

A. No, sir.

Q. They weren't worthy of adoption?

MR. NAIMARK: Again I object on the same basis, and also move to strike unless it is related to the taking of pictures.

360 MR. McMAHON: I have the right to test the credibility of the witness.

TRIAL EXAMINER MAHER: Overruled.

Q. (By Mr. McMahon) Have you gone over your testimony with Mr. Naimark prior to coming in here this morning?

A. Have I gone over any testimony?

Q. Yes.

A. I don't understand what you mean by going over my testimony.

Q. Did you go over your testimony with Mr. Galvin or any other gentleman here?

A. I don't understand your term "go over."

Q. Did they review with you what you were going to be asked?

A. We have discussed this, yes.

Q. But he didn't ask you the questions he was going to ask you?

A. No.

Q. How many times did you go through this genial discussion?

A. Once, to the best of my knowledge.

Q. When was that?

A. Oh, it must have been two or three weeks ago.

Q. And I guess it was at the Sheraton Motel?

A. You have guessed correctly.

Q. And who else was there with you and Mr. Naimark?

A. Mr. Greene.

361 Q. Was there anyone else other than those two learned gentlemen?

A. There were other people there. I don't recall just exactly whether they were there at the time or not.

Q. Mr. Lynch, we have left him out. Didn't he make it?

A. I have seen Mr. Lynch at the Sheraton, yes.

Q. Now, I direct your attention once again to General Counsel's Exhibit No. 2 in evidence and you were — on March 11th, you tell us, if I recall correctly, that you were inside that gate taking pictures, am I correct?

A. Yes.

Q. Well, what time was it that Louis Hosid ran into you in a menacing manner, what time of day was that?

A. I would say that was afternoon.

Q. Was it one o'clock, two o'clock?

A. It was between twelve and 2:30.

Q. And had you been instructed about the monitors which the Company had?

A. Had I been instructed?

Q. Yes, did you know about this monitor system which had been set up?

A. Yes.

Q. And did you receive any instructions with respect to this monitor system?

A. No.

362 Q. What was the monitor system, as you understand it?

A. I think our management, in order to maintain peace and the welfare of all our working employees had established a series of people to—if I may use the term monitor each of our entrances.

Q. Do you know who the monitor was at the railroad gate?

A. No.

Q. And had you received any instructions concerning any threats made to you to report them to the monitor and then they would tell you what to do?

A. No.

Q. You never heard any such thing?

A. You say had I and I said No.

Q. Did you know what to do?

A. Did I know what to do?

Q. If you were threatened.

A. I think I would consider it at the time.

Q. What did you consider?

A. Well, I reported that I had been threatened, I pretty "shook up".

Q. O.K. Did you report this threat of Louis Hosid?

A. Beg pardon?

Q. Did you report the threat made on you by Louis Hosid?

A. I did.

Q. To whom?

363 A. To Mr. Iles.

Q. Did he suggest that you make a statement?

A. He asked me if I would like to make a statement.

Q. Well, what did you say?

A. I said I would.

Q. And did you make such a statement?

A. I did.

Q. And was it under oath?

A. No, I did not make a statement at that time.

Q. Didn't like to?

A. I did not make a statement at that time.

.

365 Q. Where were you? Were you inside the gate when Mr. Hosid is alleged to have brandished in a menacing manner with a stick?

A. Yes.

Q. Was the gate closed?

A. Yes.

.

366 Q. Did you make a written statement of the incident allegedly involving you and Mr. Halstead to Mr. Iles?

A. I did not.

Q. To Mr. Greene?

A. I did not.

Q. To anyone?

A. I did not.

Q. When is the first time that you made a written statement concerning this incident which you allege occurred between you and Mr. Halstead to anyone?

A. I have not.

Q. And when is the first time that you made an oral statement of this incident involving you and Mr. Halstead?

A. The first time I made an oral statement? Probably the day that it occurred.

Q. And to whom did you probably make it?

A. Probably to Mr. Greene or Mr. Iles.

Q. Why would you say probably Mr. Greene and Mr. Iles?

A. Because I do not remember exactly to whom I did make the statement.

Q. Do I understand that you would see them virtually every day at the Sheraton Motel?

A. Yes.

Q. And was that every day except Sunday?

367 A. Every day? No.

Q. How many days were they not there?

A. I did not keep track of Mr. Greene or Mr. Iles.

Q. Well, it is possible that you did not make it to either one of those two then?

A. Yea. Q

Q. And then who would the next in order of possibility be after Mr. Iles and Mr. Greene?

A. I do not understand the "order of possibility".

Q. Well, you suggest it was probably Mr. Iles or Mr. Greene. Then you tell me there were days that they may not have been there.

A. Correct.

Q. You told me you probably made the statement I am now asking whom next might it probably — —

MR. NAIMARK: I object to the form of the question.

A. I might not have made it to anyone.

Q. (By Mr. McMahon) Well, you might probably not have made it to anyone?

MR. NAIMARK: It is a hypothetical question and no foundation for it.

MR. McMAHON: I accept the answer. He might not have made it to anyone.

Q. (By Mr. McMahon) There is no doubt about it. You were behind this closed gate when Mr. Hosid waved the stick at you, is there?

368 A. No.

Q. You were behind it and the gate was closed?

A. Yes.

Q. Could you tell us approximately how high this gate is?

A. No.

Q. Would this serve as a basis for — —

MR. NAIMARK: Go ahead, finish your question.

Q. Would looking at the picture serve as a basis for making an approximation as to the height of the gate?

A. No.

Q. It wouldn't help you at all?

A. No.

Q. Allright. Fine. How many times have you seen that gate?

A. I do not know.

Q. If I suggest that you saw that gate perhaps thirty times, would you adopt that suggestion?

A. No.

Q. Would you think you saw it more than that?

A. Probably.

Q. Probably?

A. I don't frequently look at gates.

Q. How many days from March 5 up to the middle of April can you give us your best recollection how many times that you took pictures of that gate — —

369 A. That I took pictures of the gate?

Q. Yes.

A. Are you speaking of days now or times?

Q. Times.

A. Well, each time you flash a shutter on a movie camera you are taking a picture, and I have no idea.

Q. How many days?

A. Once.

Q. One day?

A. Yes.

Q. What day was that?

A. March 11th.

Q. That was the only day that there was anything worth while taking down there?

MR. NAIMARK: I object to that.

TRIAL EXAMINER MAHER: Sustained.

Q. (By Mr. McMahon) Did you ever receive instructions any time after March 11th to take pictures of that gate?

A. After March 11, 1960? No.

Q. You know very little about the gate?

MR. NAIMARK: I object to that. I object to that.

372 Q. (By Mr. McMahon) After looking at your statement, your written statement, upon reading the written statement did you not say "That is just what I just said"?

MR. NAIMARK: I object. The record speaks for itself as to what he said. He is not only being repetitious and making improper use of the document, but being repetitious.

TRIAL EXAMINER MAHER: The objection is sustained.

MR. McMAHON: Well, I think that I am being faced with a very difficult and capitious witness.

MR. NAIMARK: I take exception. I think the witness is being faced with a difficult interrogator.

Q. (By Mr. McMahon) Did you not testify under oath to Mr. John Shee on the 15th day of March, 1960, in Syracuse, New York, to the following statement, and I quote, "Around 10 A.M. on March 11, 1960, I was instructed to go to the Thompson Road gate because a train was

scheduled to pick up some material from the plant". Did you make that statement, or didn't you?

373 A. Yes.

Q. (By Mr. McMahon) Was that statement true when you made it?

A. Yes.

Q. And is it true now?

A. Yes.

Q. And there is no doubt that you were instructed to go?

A. No.

Q. And do you recall who gave you those instructions at this point?

A. No.

Q. (By Mr. McMahon) Did you, in this statement to Mr. Shea, referring to the gate, make the statement "It is under control of both the company and the railroad"?

MR. NAIMARK: I object to that as improper cross; it was not brought out on direct.

TRIAL EXAMINER MAHER: Sustained.

376 HUGH LINCOLN, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER MAHER: Please be seated and give your name and address to the reporter.

THE WITNESS: Hugh Lincoln, R.D. 2, Fulton, New York.

DIRECT EXAMINATION

Q. (By Mr. Naimark) Mr. Lincoln, by whom are you employed?

A. Carrier Corporation.

Q. And how long have you been employed?

377 A. Thirteen years.

Q. And what is your position with the company?

A. Assistant Employment Manager.

Q. Were you employed on March 2, 1960, with the company?

A. Yes.

Q. And in connection with the strike which occurred, were you given any assignment?

A. I was.

Q. What was the assignment?

A. Roving monitor.

Q. What did you do as a roving monitor?

A. I observed the various pickets at the various gates at Carrier.

Q. And, did you report on them?

A. And made reports back to headquarters.

Q. Now, directing your attention to March 11, 1960, were you present at this railroad gate?

A. I was.

Q. What time were you there, approximately?

A. 2:30.

Q. Were you there when the train was crossing Thompson Road?

A. I was.

Q. From which side was it crossing?

A. I was on the east — it was crossing from the west to the east.

378 Q. Will you tell us what you observed at that time?

A. I observed the train approach the west side of Thompson Road, from the west, and it stopped and several pickets went over and conferred with the personnel on the engine.

Q. Approximately how many pickets were there?

A. At the engine?

Q. On the westerly side of Thompson Road?

A. I would say approximately six.

Q. Continue and tell me what you observed.

A. After a few minutes the pickets came back across the road and joined a larger group of pickets on the east side of the road directly in front of the gate and milling around within the track area.

Q. Did the train subsequently come out? Well, did it go in through the gate?

A. The sheriff halted the traffic, and the train proceeded across the road and attempted to enter the gate.

Q. Did the train subsequently come out of the gate?

A. At this time?

Q. Well, I will withdraw that question.

At that time or at any time that day did you see Francis Brewster there?

A. Yes.

Q. Did you see Jay Sherman there?

A. Yes, I did.

379 Q. Did you see Louis Hosid there?

A. Yes.

Q. And did you see them do anything?

A. They were standing within the track area in front of the train and hollering "Come on, you Steelworkers, get in here and let's not let them enter."

Q. Now, who said that?

A. I know that Francis Brewster was one of them that said it. That is the only one that I could identify as to saying it now.

Q. What were the pickets doing with respect to the train?

A. They kept milling around in front of the train trying to obstruct it.

MR. McMAHON: Well, I think that a description of what they did would be sufficient to form a basis for what their motive and intent was, and I move that the last part as to what they were attempting to do be stricken.

MR. NAIMARK: We will consent to the striking of the word "obstruct".

Q. (By Mr. Naimark) Tell us what they were doing?

A. Milling around in front of the engine, hollering, cursing, waving their arms.

Q. Did you notice any identification sign as far as the Union was concerned?

A. Meaning on their person or — —

380 Q. Well, either place, yes. First on their person and also any identification.

A. They were wearing buttons that said United Steelworkers.

Q. Did you notice any other signs?

A. There was one other sign, a placard stuck in a snow bank.

Q. Do you know what that said?

A. "This plant on strike. United Steelworkers of America."

Q. Now, what happened after that? Did you have occasion to leave the railroad gate on that day, how long did you stay there?

A. I stayed until the engine left the property.

Q. And then what did you do?

A. Then I proceeded back to the motel.

Q. Were you at gate 1 that day at all?

A. Yes, I was.

Q. What time approximately?

A. Approximately a quarter to five.

MR. McMAHON: I am sorry.

Q. (By Mr. Naimark) A quarter to five.

What did you observe at gate 1?

A. There were a lot of pickets at the entrance.

Q. How did you get there?

A. "I drove my car there.

Q. What happened when you got there?

A. I went to turn in the entrance and they obstructed
381 my passage and told me that they were not letting
anybody in, and when they wouldn't remove, I backed
up and drove on.

.

390 Q. (By Mr. Naimark) Directing your attention to
April 5, were you on duty at that time?

A. Yes.

Q. And where were you?

A. Gate 1.

Q. Do you know an employee named Arthur Calland?

A. Yes.

Q. Did you see him there at that time?

A. Yes.

Q. And what did you see him do, if anything, at that
time?

A. I observed him as he walked along the picket line
spit and kick at a Deputy Sheriff.

MR. McMAHON: I object to that as being immaterial,
391 irrelevant and beyond the scope of the pleadings.

MR. NAIMARK: It is very much within the scope
of the pleadings in clause (e).

MR. McMAHON: This is the new (e)?

MR. NAIMARK: That is right.

MR. McMAHON: Is this Deputy Sheriff an employee
of Carrier? I know they were acting as though they were,
but I wondered if they are or not.

MR. NAIMARK: Well, I don't know, but in any event we will establish that — —

TRIAL EXAMINER MAHER: May I see the pleadings, please? Inflicting physical injury and hurt to various individuals. I assume the Sheriff is an individual.

MR. NAIMARK: And also an employee.

MR. McMAHON: That isn't established as yet.

TRIAL EXAMINER MAHER: That he is an individual?

MR. McMAHON: I will concede that he is of the genus homo sapiens. I like sheriffs, but we haven't a proper foundation at this point.

Q. (By Mr. Naimark) At approximately what time did this take place?

A. About 4:30 p.m.

A. And at the time this happened, were there any other employees present?

392 A. Yes.

Q. Was there any representation of the Union that you know of present?

A. Yes.

Q. Who would that be?

A. Francis Brewster, John Kowalski, Jay Sherman.

393

CROSS EXAMINATION

Q. (By Mr. McMahon) While it is fresh in our mind, Mr. Witness, you state on April 5, Gate No. 1, at about 4 p.m., you saw Mr. Arthur Calland spit and kick — spit at and kick at a deputy sheriff?

A. Yes.

Q. And you say Mr. Brewster and Mr. Kowalski and Mr. Jay Sherman were present?

A. Yes.

Q. Where did this spitting and kicking take place, let's down to — —

A. About five feet from me.

Q. About five feet from you?

A. Yes.

Q. And where were Mr. Brewster, Mr. Kowalski and Mr. Sherman?

A. Walking in the picket line.

Q. Well, with respect to where the spitting and kicking took place?

A. They were probably about 20 feet away.

Q. You say the spitting and the kicking took place about five feet from where you were?

A. Yes.

394 Q. What were you doing there?

A. Observing the picket line.

Q. Where would this be with respect to Thompson Road?

A. Right on the shoulder, practically on the shoulder.

Q. And gate 1 is the main gate?

A. Right.

396 Q. Now, on April 5, gate No. 1, this incident involving Mr. Calland, you testified to, you stated that you

were about five feet from this expectoration and the kicking, and was this to your right or to your left?

A. To my left.

Q. And you were facing the gate on Thompson Road?

A. Facing north on Thompson Road.

Q. You were facing north on Thompson Road so that this would have been to your left, would have been westerly 397 on Thompson Road?

A. Right.

Q. And would it, in terms of degrees, let's use a clock, this would be in the six to twelve o'clock area?

A. Yes.

Q. Where would it have been directly opposite on this angle, to your left or slightly behind you?

A. If you are referring to the clock, let's say ten minutes to.

Q. About ten o'clock?

A. Yes.

Q. And to your left and just slightly in front of you?

A. Yes.

Q. I will use our same clock analogy, was Mr. Brewster the one you placed there that day?

A. Yes, say they were about two o'clock.

Q. And which way were they faced?

A. North.

Q. They were facing the same direction at two o'clock?

A. Yes.

Q. And about how far away?

A. Twenty feet.

Q. And where was Mr. Kowalski?

A. Along with Brewster.

Q. And Mr. Sherman?

398 A. He was farther beyond.

Q. Farther beyond two o'clock?

A. No, John Kowalski and Brewster, ahead of them.

Q. Did you have an opportunity to observe what Mr. Brewster and Mr. Kowalski were doing at this spraying incident?

A. Walking.

Q. By the way, Mr. Lincoln, do you know Gordon Dinger?

A. Yes, I do.

Q. And was he a monitor with you?

A. He was a photographer.

Q. Was he also one of the monitors?

A. Not known as a monitor, known as a photographer.

Q. He was a photographer. He was not known as the monitor?

A. I wouldn't say he was.

Q. You don't know?

A. He was not a monitor.

399 Q. He was not a monitor. How many monitors did you have, or do you know?

A. Approximately forty.

Q. Why are you so sure that Gordon Dinger wasn't one of the forty?

A. Because I said he was the photographer.

Q. The fact that he was a photographer, would that exclude him from the monitor group?

A. He was not in our group. Our group was known as monitors, not photographers.

Q. And do I understand, Mr. Lincoln, that if you were 400 a photographer you were necessarily not a monitor?

A. Not necessarily.

Q. Well, I understood you, when I was asking about Mr. Dinger —

A. There were two groups, monitors and photographers.

Q. There were about forty monitors and about how many photographers?

A. Twenty to twenty-five. I am not sure.

Q. And did you, you drove around, did you have a car phone in your automobile that placed you in contact with the Sheraton Motel?

A. At times.

401 Q. (By Mr. McMahon) Going back to this April 5th incident for just one moment, Mr. Lincoln, as I understand it, you were facing north?

A. Right.

Q. And Thompson Road runs generally north and south?

A. Right.

Q. And using a clock as a point of reference, this spitting took place at about ten o'clock?

A. Right.

Q. And then at about two o'clock, or 20 feet away you saw Mr. Brewster?

A. Um huh.

Q. And you are sure about that?

A. Sure.

Q. No question about it, Francis Brewster? You know Francis Brewster?

A. Yes, I do.

Q. No question about the man that he was there?

A. That is right.

TRIAL EXAMINER MAHER: Which way was Mr. Brewster facing?

THE WITNESS: North.

Q. (By Mr. McMahon). So you saw his back?

A. I have been watching him parade around the picket line for about twenty minutes.

Q. But at this two o'clock point you saw him?

402 A. And I recognized him.

Q. You know his back?

A. I knew him and his back.

Q. I think I asked you this, Mr. Lincoln, well, but to be positive were you the chief monitor?

A. No.

Q. Who was the chief monitor?

A. Tom Asquieth.

Q. Tom Asquieth?

A. Right.

Q. And when did you join the monitors?

A. March 2nd.

Q. At about what time, about what time of the day?

A. Did I join the monitors, you mean my job as a monitor?

Q. Yes, sir.

A. In the middle of the day.

Q. Had this matter of monitors, was this discussed prior to March 2nd?

A. Yes.

Q. About how much prior to March 2nd?

A. Three weeks.

Q. Did you do any monitoring work prior to March 2nd?

A. Yes.

Q. Did you take tape recorders and pictures?

A. No.

403 Q. Just tape recordings?

A. No tape recordings.

Q. Did you use this parabolic mike, microphone?

A. Tried.

Q. How many times did you try?

A. Once.

Q. Would you fix the date?

A. No.

Q. Can't?

A. No.

Q. After March 2nd, did you take pictures?

A. Yes.

Q. And did you use the microphone and tape recordings?

A. No.

404 Q. (By Mr. McMahon) Who is Burton Kehoe?

A. An employee.

Q. A monitor?

A. No.

Q. A photographer?

A. No.

Q. A wire tapper?

A. I don't know what you would call his title.

Q. You picked him up on March 11, 1960, and he accompanied you to this railroad gate?

A. That is right.

Q. You testified, Mr. Lincoln, that you saw Mr. Brewster at the railroad entrance?

A. Um huh.

Q. On March 11?

A. Um huh.

Q. Do I recall your testimony correctly?

405 A. That is right.

Q. About what time of day?

A. 2:30 in the afternoon.

Q. You saw Mr. Brewster about 2:30 in the afternoon?

A. I saw him, yes.

409 Q. You observed him on the scene, March 11th at the railroad entrance on Thompson Road, 1960?

A. Right.

Q. And when is the first time that you saw Mr. Kowalski, the time of day, approximately?

A. Between 2:00 and 2:30 p.m.

Q. You may have seen Mr. Kowalski there about a half an hour before you saw Mr. Brewster?

A. I saw Mr. Brewster first.

Q. You saw Mr. Brewster first?

A. Right.

Q. You didn't see Mr. Kowalski driving a car that day, or did you?

A. I saw him drive his car, backwards.

Q. Where was Mr. Kowalski when you saw him on March 11, 1960 at the railroad gate at Thompson Road?

A. Relative to what?

Q. Relative to Thompson Road, DeWitt, County of Onondaga, City of Syracuse.

TRIAL EXAMINER MAHER: Counsel, we don't need
410 a description of that sort. Let's get the question and
answer.

Q. Where did you see him?

A. When I first saw John Kowalski he was standing at the edge of the pickets where they were congregated on the shoulder of the highway.

Q. And that would be on the east shoulder?

A. That would be upon the east shoulder.

Q. And that would be north or south of the tracks?

A. I would say center.

Q. In the center of the tracks?

A. Yes.

Q. The newspaper photographers were there at the time?

A. They were.

Q. And Deputy Sheriffs?

A. And Deputy Sheriffs.

Q. And were there other people there who appeared to be just passers-by, children?

A. I don't remember any children.

Q. Well, young lads?

A. No.

Q. You have no recollection of that?

A. Not of children, not of children.

Q. But there were other people? Apparently as this train was going back and forth—I say apparently—I understand that there were other people who were not interested in this dispute at all.

411 A. Spectators — —

Q. Spectators, thank you. You stopped, and that is your observation as well?

A. That is right.

Q. And you reported to Mr. Iles as well?

A. He was superior to the chief monitor.

Q. Mr. Asquieth and then Mr. Iles?

A. Right.

Q. Who was higher than Mr. Iles in the chain of command?

A. Mr. Kehoe, Mr. Holm.

Q. Mr. Kehoe, and who is Mr. Kehoe?

A. I do not know his title.

Q. But he was higher in the chain and then Mr. Iles?

A. That is right.

Q. Could you just give us the chain again?

TRIAL EXAMINER MAHER: How does that tie in with direct examination, Counsel?

MR. McMAHON: It is enough that I have to go through this with him (referring to Counsel for General Counsel).

Q. (By Mr. McMahon) Prior to March 2nd, 1960, do you know what duties Mr. Kehoe performed for Carrier Corporation?

MR. NAIMARK: I object. I don't see the relevancy of Mr. Kehoe's duties in respect —

413 TRIAL EXAMINER MAHER: Counsel, have you any further questions?

MR. NAIMARK: No. ||

TRIAL EXAMINER MAHER: I have just one question.

414 In a description of the activity that took place at gate No. 1, you made reference to a lot of analogies suggested by Counsel in the form of a clock, and you indicated where the spitting took place at ten o'clock with you facing north and Mr. Brewster and Mr. Kowalski were located by you at two o'clock. I will ask you one further point: Assuming, as I understand the testimony to reflect that your picket line was in the form of an elongated circle, that is the left ellipse, where was the southerly-most point of that picket line with respect to the clock, you being in the center of the clock facing north?

A. Right where I was standing.

Q. In other words, at a quarter past?

A. The southerly-most point I was standing right there.

MR. McMAHON: May I help. Were you at six o'clock, or were you in the center of the clock?

THE WITNESS: Six o'clock.

TRIAL EXAMINER MAHER: All right. That answers my question.

434 **MR. NAIMARK:** Mark this as G.C. 14.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 14 for identification.)

TRIAL EXAMINER MAHER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER MAHER: On the record.

MR. NAIMARK: I at this time have marked G.C. No.

14, and which I offer in evidence and which is a quit-claim deed dated the first day of October, 1947, and recorded the 3rd day of October, 1947, in the — —

MR. McMAHON: Well, I move to reject the offer as not being within the rule of civil practice of the State of New York, I think, it is Section 367 of the Rules of Civil Practice which covers 389 (2) of the Rules of Civil Practice which cover the presumptive validity of documents that are recorded.

Since 1947 it would not be twenty years, if my arithmetic serves me. It would have no presumptive validity; apparently there is no witness here to support its validity, and I therefore move that you reject it.

.

436 MR. McMAHON: As I understand it, we have an offer of proof, or an offer of General Counsel, Exhibit No. 14, and prior to recess it was offered, and I now raise to make my objections that this purports to be a quit-claim deed, or more appropriately a photocopy of a quit-claim deed and passingly the objection about it being the best evidence — and there being no explanation for not having the original — I will waive objection on that account.

My objection is much more fundamental. The objection is that there is no witness who testifies in support of this
437 document, no witness who testifies where he obtained this document, and so I take it there has been no statement even by way of argument that the Counsel for the General Counsel has any knowledge.

As I indicated before, Section 389 a of the Civil Practice Act of the State of New York states the proper way to introduce documents upon which Counsel in an action alleged where title to real property is in issue, can rest

on a presumption. These are documents that have been on file in the office of the County Clerk for a period of twenty years or more are presumptive evidence.

This document on its face does not purport to have been recorded for a period of twenty years or more.

Secondly, and equally fundamentally, this document is offered without a survey, much less supported by the surveyor who made the survey.

Thirdly, this document now purports to rest on still a fourth transaction. That is to say a transaction between the Defense Plant Corporation to Syracuse Land Development Corporation.

Parenthetically I note that the Trial Examiner observed that by taking judicial notice that the Reconstruction Finance Corporation is successor to the War Assets Administrator, or some such observation, who was the successor to whom, and as to that I have no objection. I am assuming if it is a proper matter for judicial notice 438 as to who the successor is, it is not — —

TRIAL EXAMINER MAHER: It is official notice, not judicial notice.

MR. McMAHON: Again what I am trying to say is that my quarrel is not with that particular problem.

But now we get down to the witnesseth clause in the second paragraph relating to the lands to be demised. I read that they start at a point formed by the intersection of the easterly line of Thompson Road, and I think we don't know where the easterly line of Thompson Road is because that hasn't been fixed by the County Surveyor.

But passing that, it is at the easterly line of Thompson Road with the southerly line of lands conveyed to Defense Plant Corporation by Syracuse Land Development Company, Incorporated.

Now, it is the long way around, but I suppose if there was a showing of what the lands that were conveyed by Syracuse Land Development Corporation to Defense Plant Corporation, we might have something.

Then I have to go on to say that to run certain courses and distances, and I am frank to confess that I don't know whether these courses, and I read one of them, 84 degrees, 58 minutes, 30 seconds east, whether or not that is a true distance, a magnetic course, or whether it is relative to the course of Thompson Road. And any one of the three I suppose are possible.

I must confess that as a land conveyance it leaves something to be desired, and I can only speak for the Erie County and the Western District of the State in which the degrees—if the word “east” appears after it, that it would be relative. In other words, it would read south 84 degrees 58 minutes 30 seconds, there would be no need for “east” because then it would be an indication that it would be a true course, but with the “east” it may be relative or perhaps magnetic.

And so on through the whole course, throughout this entire document.

I suppose it is appropriate for the record to show that it is—how many pages we have—I won't pause now to count them, but I am certain Counsel for the General Counsel can.

The thing is we still don't have an appropriate form, competent proof directed to the specific point of whether or not this tract of land which harbors upon and rests, these railroad tracks inside the Carrier Corporation gate belong to either Carrier Corporation, whether they belong to the New York Central Railroad, whether or not they still perhaps belong to the War Assets Administrator or

the Reconstruction Finance Corporation, or the Syracuse Land Development Company.

I am suggesting the additional possibility that somewhere along this chain of title they forgot to or omitted 440 to deed certain lands.

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441 I move to amend paragraph XIII (a) of the complaint by adding the words "to individuals in the presence of employees and representatives of respondent Local 5895."

TRIAL EXAMINER MAHER: XIII (a)?

MR. NAIMARK: That is right.

MR. McMAHON: May I have that language again, to individuals — —

MR. NAIMARK: "to individuals in the presence of employees and representatives of respondent Local 5895" after the words "Carrier's employees".

TRIAL EXAMINER MAHER: Any objection?

MR. McMAHON: I certainly do object to any such amendment at this late time as being prejudicial and unwarranted, no proper foundation, no basis, no showing of necessity for it other than to cover up a failure of proof . . .

TRIAL EXAMINER MAHER: I sustain your objection and I deny the motion to amend.

The next motion?

MR. McMAHON: I don't like the word "cover up" as it shows I used — this is used as a cover up.

TRIAL EXAMINER MAHER: I think we understand the nice sense that you used it in.

444 **MR. McMAHON:** I would like to move for a dismissal of the complaint on all of the grounds specified in the Federal Rules of Civil Procedure.

TRIAL EXAMINER MAHER: If I were to indicate to you that I was taking your motion under advisement, I would be perhaps conveying a false note to you that the case could be in some way curtailed because there was some question in my mind. I don't wish to convey any notion on this matter so you will have ample opportunity to present the full case, at this time I will deny the motion and will indicate that you may make it at some future time in the proceeding.

MR. McMAHON: I would like to further move to dismiss the complaint and all the proof at this stage of the General Counsel's case in so far as it alleges violations of Section 8 (b) (1) of the Act and in so far as it doesn't properly allege violations of Section 8 (b) (1) and alleges evidentiary matter, I move to dismiss the portions of the complaint which do not plead the ultimate pleadable facts.

In so far as violations of Section 8 (b) (1) are concerned, it would have to be their proof that a labor organization or its agents restrained or coerced employees in the exercise of the rights guaranteed in Section 7.

I respectfully submit that I know of no case in which
445 the right of employees to take pictures of fellow employees to make a chronological study of proof for litigation either in State courts or Federal courts is a right protected by Section 7.

I submit further that police officers are not employees within the meaning of the Act, and so that any acts that

would have been directed to them, however objectionable they may be, in other forms, are not objectionable under Section 8 (b) (1).

This was not, and I think — to state the matter broadly — and I don't mean to anticipate either a reserve or a denial, but as I intend to brief further, I don't think they were in the scope of the Congress' benign blessing when they enacted the Wagner Act and amendments thereto and the Taft-Hartley and the Landrum-Griffin Act, and I make that motion.

TRIAL EXAMINER MAHER: For the reasons given for the motion, I am constrained to deny it at this time. I have given my word to you that you may give it at some future time in this proceeding.

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446 **ROGER POTTER**, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. McMahon) Roger, did you hear Deputy Sheriff Tedesco testify in this court room?

A. I am sorry, I wasn't here.

Q. My notes indicate that Sheriff Tedesco testified that on March 11, 1960, that as you were getting up you swung your hand, probably not intentionally, but struck him; and that he further testified that he came upon the scene because it looked like you were going to swing at another man.

Do you recall an incident on March 11, 1960, at which time Deputy Sheriff Tedesco, or some other officer took you into custody? Yes or No.

A. It wasn't Deputy Sheriff Tedesco that took me into custody, it was a deputy sheriff named King.

Q. I see. And would you fix the time of day for us, about what time of day?

A. I imagine about one o'clock.

447 On March 11, 1960?

A. Yes.

Q. Now, how many sheriffs were around there that you saw?

A. I think about eight.

Q. What is the first thing that you heard them say?

Q. (By Mr. McMahon) Do you know the Deputy who made the statement?

A. No, I don't.

Q. Did he wear a badge?

A. Yes.

Q. Did he have a uniform on?

A. That is about all I am aware of, that they wore badges and had uniforms on because I wasn't acquainted with them before that time.

Q. I see. Just prior to your arrest, what were the first words you heard the Deputy Sheriffs say?

MR. NAIMARK: I object unless we have some identification as to who is doing the talking.

MR. McMAHON: That is not crucial. I want to set the background for the testimony.

448 Q. (By Mr. McMahon) What were the first words you heard them say?

A. Let's take a couple of these guys in.

Q. Now, did you strike Sheriff Tedesco or any of these Sheriffs?

A. No, I didn't.

Q. When is the first time you heard that you were alleged to have struck him?

A. The day before yesterday.

Q. And where did you find this out?

A. Out here in the lobby.

Q. In the lobby of the Federal District Court?

A. Yes.

Q. Second floor?

A. Yes.

Q. And how was this information communicated to you?

A. The Deputy Sheriff was talking to myself.

Q. Was it Deputy Sheriff Tedesco?

A. Tedesco was talking to me.

Q. What did he say?

A. And he said when I was getting up I threw my hands back and hit him on the side of the face and he thought I just brushed him on the side of the face, and he thought it was accidental.

449 Q. Did he indicate that he thought it was serious?

A. He said that he didn't think that I intended anything by it.

Q. Now, was there a time about one o'clock on March 11 at the railroad entrance to the Carrier plant on Thompson Road when you were thrown to the ground?

A. Yes.

Q. Will you tell us the circumstances of that?

A. We were walking — —

Q. Just a moment, Roger. Was there a lot of snow on the ground that day?

A. Yes.

Q. Was the ground covered with snow?

A. The ground was covered with snow and it was slippery.

Q. It was cold?

A. Yes.

Q. Now, go ahead and tell us what happened.

A. We were walking back and forth.

Q. And picketing?

A. Picketing. And several sheriffs came and pushed us and I fell down.

MR. NAIMARK: Well, now, wait. I object to this.

MR. McMAHON: It is background to when Sheriff Tedesco came over. Just to describe the incident that he didn't strike anybody.

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450 Q. (By Mr. McMahon) You went down, did you?

A. Yes, I fell down and — —

Q. Was there anyone on top of you?

A. There were two or three deputies fell on top of me.

Q. I see. And then you were arising?

A. When I was rising, I had my hands out like that and I might have brushed somebody with by hand, but I wasn't aware of it.

Q. You weren't aware of it until Deputy Sheriff Tedesco told you about it out in this hall a day or so ago?

A. That is right.

MR. McMAHON: Your witness.

MR. NAIMARK: No questions.

(Witness excused.)

451 **DOMINICK ALBANESE**, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER MAHER: Please be seated and give your name and address to the reporter.

THE WITNESS: Dominick Albanese, R. D. 2, Kirkville, New York, Huyler Road.

DIRECT EXAMINATION

Q. (By Mr. McMahon) Tony, did you hear a conversation in the vestibule of the Federal Courthouse here in Syracuse the other day between Deputy Sheriff Tedesco and Roger Potter?

A. Yes.

Q. Did you participate in the conversation?

A. Yes, sir, I did.

Q. Will you tell us what the conversation was about?

A. Well, — —

Q. Let me state it this way: Did it relate to March 11, 1960, and the railroad gate at Thompson Road Carrier plant?

A. Yes, it did.

Q. Will you tell us what you heard Sheriff Tedesco say 452 and what you heard anybody else say?

A. Well, the way I recall the conversation, it was Monday, or two days ago it was.

Q. It would be Tuesday.

A. Tuesday. They was talking out there and this Deputy or Sheriff he was in civilian clothes, and he was talking with Potter and Halstead and myself, and he said something to me that they intended to take the people up to — around the block and let them out, but when he turned around they were handcuffed, and then he was forced to take them down to Cedar Street.

Q. Did you hear Sheriff Tedesco, Deputy Sheriff Tedesco say anything about what he thought about the actions of Roger Potter striking him?

A. He said it wasn't intentional. He — the way I heard him say, when Roger Potter was getting up, it looked like he was trying to hold his balance; and he accidentally hit him alongside the jaw, and he said he didn't pay no mind to it because he figured it was just an accident.

Q. Tony, I direct your attention to as near as I can figure out April 4, 1960, the situation involving Harland Wallace. Is that name familiar to you?

A. Yes, it is.

Q. Do you recall an incident involving Harland Wallace and Deputy Sheriff Nash?

453 A. Well, I remember the incident, yes.

Q. And have you heard the Sheriff's testimony about this incident before, in some other court, under oath?

A. Yeah.

Q. And what court?

A. In East-Syracuse, Lee Penders.

Q. Now, going back, what did you observe?

A. At the court?

Q. Well, no, on this — — I guess it is April 4th.

A. The day — on the picket line?

Q. Yes.

A. Well, that day I wasn't on the picket line itself, I was across the road from it.

Q. Which would be — —

A. On Thompson Road, that would be on the west side of Thompson Road.

Q. Right.

A. I was standing right by the public telephone booth.

Q. I see.

A. Right there at the corner of the parking lot. The pickets were going around in their circle there. The picket signs and the sheriffs had their lines and two sheriffs, one of them each side of Wallace, one by the right arm and one by the left one, and one behind and bringing Wallace across the road from the picket line.

454 Q. Which would be on the east side?

A. That would be on the east side, were bringing

him over to the west side where one of the Carrier parking lots are, where the sheriffs had their cars parked.

Q. Then what happened?

A. When they get on the west side of the parking lot right there in a drain ditch all three of them went down, Wallace and the two sheriffs.

Q. What happened?

A. Well, it was kind of hard to see because about — I would estimate at least no less, but at least eight sheriffs anyway, were gathered around the circle, and all I could see were these little leather blackjacks they were swinging around in there.

Q. As I get it, they had Wallace, one on each side?

A. Yes.

Q. One behind him, and they hustled him across?

A. Yes.

Q. From east to west on Thompson Road, and he was plunged into a drain ditch?

A. Yes.

Q. And the two of them you say piled on top?

MR. NAIMARK: I object. He didn't say that, Mr. Examiner. He said all three fell down.

Q. (By Mr. McMahon) Where did they fall down?

455 A. They fell in the ditch. Well, Wallace was right into the ditch when they went down, and all the sheriffs got around him, and all I could see was these billy clubs,

Q. Where at this point was Deputy Sheriff Nash? Do you know Deputy Sheriff Nash?

A. Yes, I do.

Q. Where was he?

A. He was just coming out of the parking lot on the west side of Thompson Road. He had just made an arrest, and he brought the person that he arrested over to one of the sheriff's cars, and he was on his way back to the picket line when all this took place.

Q. And Wallace was down in the ditch?

A. Yes.

Q. Two other sheriffs were down?

A. Yes.

Q. You saw sheriffs milling around. Now, tell us what you saw about these black jacks?

A. Well, these sheriffs were swinging these black jacks and the best I could see, see, I ran from the telephone booth right up to where it was taking place, and I was trying to take pictures of it because I had my own private camera, and I was taking pictures myself, and I couldn't get in there, and I am trying to weasel in to take pictures, and all the sheriffs were huddled around them.

456 Q. What did Wallace say?

A. Wallace was screaming, trying to ward off the black jacks. In the meantime Nash is coming back from the arrest he made, and he got in the whole business.

Then when it broke up I seen — —

MR. NAIMARK: Well, now — —

Q. (By Mr. McMahon) It is a narrative. Go on. What else did you see?

A. When I see Wallace he was handcuffed.

Q. When you see Wallace come out of the ditch he was handcuffed?

A. He was handcuffed, and his coat torn. To me he looked pretty rough.

Q. Was Deputy Nash's eye in his head or out of his head at that time?

A. To the best of my knowledge it was in his head.

Q. Did you see Deputy Sheriff Nash later on that day?

A. I seen him in the alinement that night at Lee Pendel's Court, East Syracuse.

Q. Is Lee Pendel the Judge?

A. East Syracuse.

Q. About what time?

A. It was pretty late that evening, I would — —

Q. Seven, eight, nine?

A. More like between eight and nine.

457 Q. And did Deputy Sheriff Nash testify he wore a patch to — — Did you notice the patch on his eye?

A. Not when he came to court that night he didn't have no patch on his eye.

Q. Did he have glasses?

A. Yes, he had glasses on.

Q. And a patch over his eye?

A. Not that I can say, he didn't have none over there.

Q. Now, on March 11 at the railroad entrance to Carrier, the Carrier gate, were you there that day?

A. Yes, I was.

Q. And were you there at a time when the train was going to make its first entrance?

A. Yes, I was.

Q. And will you tell us what happened?

A. When the train was making its first entrance —

Q. Do you know Mr. Bowes?

A. Bowes?

Q. Bowes, he is the trainmaster for the New York Central Railroad.

A. If it is the trainmaster that signaled the train out of the Carrier property, I don't know him. The first day I seen him was that day. I was introduced to him by a sergeant, a sheriff sergeant.

Q. Well, did somebody come up to the railroad and say 458 something to you about leaving the train in or out?

A. It was this Bowes, he wears glasses, he is a tall fellow, slim.

Q. What did he say to you and what did you say to him?

A. He asked me if I was going to let the train through and I says "I have no objection as long as you are going in there to move Brace, Mueller and Huntley and G.E. material in and out of there". And I asked him for his waybills, and he says "We don't have any." "Well," I says, "Well, since when does a yard engine come in without waybills? You have had them in the past." He says "We don't have any." He says "I don't have to show them to you."

I says "Well, maybe you don't have to, but I would like to see them. After all, this plant is on strike. There is a picket line here. We would like to have you respect the picket line."

Q. What did he say?

A. Well, then he started getting kind of huffy with me, and he says — —

MR. NAIMARK: I object to that and ask that it be stricken.

TRIAL EXAMINER MAHER: Sustained.

A. He said that "Are you going to let this train in or aren't you?" And I repeated myself, I said "I have no objections. You have given me your word that you
459 are not going to touch any Carrier Corporation in there — —"

Q. Did he give you his word?

A. Yes, he gave me his word.

Q. And what did he say?

A. He said "You have got my word of honor that we are not going to pull any Carrier Corporation out of that — out of there."

So before I had a chance to — — incidentally, I was picket captain that day, and before I had a chance to tell the picketers to move out of the way, he rushed over and started bulldozing them out of the way himself, and the regular train crew went in and they moved a few cars around, sidetracked, and went over to Brace, Mueller and Huntley's they pulled a car out from in there and they monkeyed around and — —

Q. Let me ask you this question, Tony, first, if you know who owns that gate?

MR. NAIMARK: I object.

MR. McMAHON: Not for the purpose of proving title, but for the purpose — —

TRIAL EXAMINER MAHER: Overruled.

Q. (By Mr. McMahon) All right.

A. Who owns the gate?

Q. That straddles the railroad track.

A. It surrounds our property. I would assume Carrier 460 owns it, myself.

Q. Have you always assumed that?

A. In the ten years I have been with Carrier I have, yes.

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Q. (By Mr. McMahon) You recall having a conversation with one of these photographers, photographers or monitors on that date of March 11?

A. Never spoke to a one.

Q. Well, when they were closing the gate — —

A. Pardon me. I did speak with a photographer, but it was a man from WSYR television, and it was a television 461 man that I spoke to, newspaper work, or news man.

Q. Do you know Louis Hosid, Louie?

A. Yes, I do.

Q. Did you hear him get into any, or did you see him along about the time that the train had left there, and about what time did the train leave?

A. You mean the last — —

Q. The last time?

A. The last time the train came out and left with the crew? Of course, not having any watch with me, I could estimate the time around 3:30, four o'clock, 4:30, in there somewhere. I couldn't say for definitely.

Q. Well, fixing it at that point where the train left for the last time and you closed the gates — —

A. Carrier guards closed the gates.

Q. And was there some conversation between the pickets and those guards?

A. Well, there was a lot of scab calling, yelling scabs and — —

Q. Did you see Louis Hosid with a stick run at somebody who was behind the gate after it was locked?

A. No.

Q. Did you see any snowballs being thrown at these guards?

A. No, the ground was all frozen that day.

Q. Nonetheless I must ask you the next question. Did 462 you see any stones thrown?

A. That would be practically impossible. The ground was froze.

MR. NAIMARK: I ask that the witness be directed to answer the questions.

TRIAL EXAMINER MAHER: Answer the questions.

Q. (By Mr. McMahon) He says there were no stones to throw.

A. No, there wasn't any stones to be thrown. I didn't see any thrown.

Q. You said you were the picket captain, Tony. Were there any particular hours that you were the picket captain?

A. I was picket captain from six in the morning until 12 noon, but my relief, which was Clarence Smart didn't get there until about a quarter past twelve when I got relieved.

Q. Then you got relieved. Then did you, I take it you went to lunch and came back?

A. From that time on any occasion I had to be there I was just standing, just watching, just to stand. I left them when he came and I returned, and then I went around to the back gates and I came back again.

Q. About this conversation, in terms of the conversation with Mr. Bowes, would you fix the time? About what time did that happen?

A. It must have been close to noon or noon.

Q. Do you think it was before noontime?

463 A. It was close to noon.

MR. McMAHON: Your witness.

CROSS EXAMINATION

464 Q. Well, where did you have this conversation with Mr. Bowes?

A. It was at gate 1 when one of the pickets came up and says "The railroad is going in to pull out railroad cars."

Q. Oh. Now, did I understand you to say that Mr. Bowes was a tall and thin man?

A. He is about my size, maybe an inch or so taller, and he is not a husky man. He wears glasses.

Q. And when he came up to you, if you would — Did he come up and speak to you directly?

A. The sergeant called me over. He is a redheaded fellow, and he introduced me to him.

Q. And did he ask you, Mr. Bowes, if you would let the train go in?

A. He says "Are you going to let the train in?" I says "I have no objection."

Q. Did you have any orders issued to you from the Union with respect to permitting the train to go through the gate?

A. Did I have any orders from the Union? In respect in letting the train go through the gate? No.

Q. Did I understand you to say that you asked him for waybills?

A. I asked if I could see them.

Q. Well, what I am trying to get at, Mr. Albanese, is 465 where do you get the responsibility to ask Mr. Bowes for the waybills at this particular time?

A. Well, let me put it this way to you: That would be just like you and I out in the field hunting, and I come up to you and say "May I see your hunting license?"

TRIAL EXAMINER MAHER: May I see your what?

THE WITNESS: Your hunting license.

TRIAL EXAMINER MAHER: You being whom?

THE WITNESS: I say that would be just like me out in the field hunting, and him out in the field hunting, he is a human, I come, I go up to him and ask if I may see his hunting license.

TRIAL EXAMINER MAHER: Swap the hunting licenses?

MR. McMAHON: Not to swap them, to examine them to see if he was properly there.

THE WITNESS: To see them.

MR. McMAHON: You want to know who is shooting the guns.

Q. (By Mr. Naimark) Did the sheriff, or did the sergeant introduce you to Mr. Bowes?

A. The sergeant did.

Q. He introduced you to Mr. Bowes?

A. Yes, he did.

Q. What did the sergeant say when he introduced you?

A. The sergeant called me over knowing I was the picket captain on duty that day at the main gate, and he called me over, Mr. Albanese, and introduced me to this fellow and told me who he was and this Mr. Bowes started talking to me.

Q. Well, what did he say, Mr. Bowes?

A. He said "Are you going to let the train go through the gate?" And I says "I have no objection." After all who am I to stop a train from going through the gate.

Q. If you had no objection, why did you ask to see his waybills?

A. I asked him if I may see the waybills. In the past the railroad stated if you asked them for the waybills they would show them to you. They always had them in the past. I couldn't understand why all of a sudden one day they don't have them.

Q. Did you ask him having an assumption that he was not going to serve Carrier?

A. That is right, I did, and he gave me his word of honor that he wasn't going to service Carrier.

Q. Did you communicate this to anybody; this conversation with Mr. Bowes, after he told you this?

A. When Clarence Smart came on to relieve me, I told him I was satisfied, yes.

Q. Now, at the time that the train was crossing on March 11th, you were there also, when the train was making its crossing?

A. Which crossing are you speaking of?

467 Q. Thompson Road.

A. By that I mean are you speaking about the first time the train went in, or the second time?

Q. At any time were you there?

A. Yes, I was there when it went in the first time.

MR. McMAHON: Off the record.

(Discussion off the record.)

Q. (By Mr. Naimark) I show you what has been marked as G.C. 5, and ask you if that is a fair representation of the premises?

A. Yes, it is. This is looking from inside the gate out.

Q. You testified that there were no stones to be thrown at that time; right?

A. That is right.

Q. Would you look at that picture and tell me whether in your opinion there were no stones in that picture.

A. This is in between the tracks on the inside of the gate. Immediately outside the gate this is all frozen ground and frozen ice, and beyond that is the Thompson Road tar-blacktop.

MR. NAIMARK: I move that the answer be stricken as not responsive.

TRIAL EXAMINER MAHER: Overruled.

Q. (By Mr. Naimark) What time did you say you got to the crossing on March 11?

A. What time I got there the first time?

468 **Q.** Yes.

A. Like I said, it was before noon. I couldn't say exactly the time because I had no watch.

Q. And how long were you there?

A. I was there until my relief come and — —

Q. What time was that?

A. He says "I am here a little bit late".

Q. I just want to know — —

A. Quarter after twelve.

Q. A quarter after twelve?

A. Yes.

Q. Now, with respect to your testimony about the April 4th incident, you say you were there taking pictures?

A. Yes, I was.

Q. And what type of pictures, moving pictures?

A. Movie camera.

Q. And this incident, that occurred with respect to Wallace and Nash, about how long do you say that took place?

A. Just from the time — —

469 TRIAL EXAMINER MAHER: You are talking about the ditch incident?

MR. NAIMARK: Yes.

A. Now you are speaking from the time that he picked up Wallace on the east side of Thompson Road and dragged him across to the west side and from the time they picked him out of the ditch after they had him handcuffed until the time they took him in the car?

Q. (By Mr. Naimark) Let's take it from there on. How long did that take?

A. Right from there on?

Q. Yes.

A. Oh, God, it probably happened in a matter of five or ten minutes.

Q. Did you take pictures of this incident?

A. I said I was trying to.

Q. Well, what prevented you?

A. All the sheriffs gathering around Wallace when they had him in the ditch.

Q. And you say two sheriffs were bringing him across the road?

A. Three.

Q. Oh, three?

A. Yes.

470 I thought you testified to two.

A. I said one by the left arm, one by the right arm, and one behind him.

Q. And they brought him from the east portion of Thompson road to the west?

A. Yes.

Q. And where were you?

A. I was standing right at the corner of the parking lot, on the west side.

Q. And how close were you to the ditch where they fell?

A. Well, as soon as I seen what was going on, I ran over there and I was probably, oh, well, from me to you, but there is this here wall of sheriffs.

TRIAL EXAMINER MAHER: Let the record indicate a distance between eight and ten feet.

A. Well, about, yes, about eight to seven feet, and then—

Q. (By Mr. Naimark) And do you say you had difficulty in taking pictures of this?

A. I couldn't get through all the sheriffs to take any pictures, weaving the camera around trying to take pictures, and I couldn't get in next to him.

Q. You say you know Deputy Sheriff Nash?

A. Yes, I do.

Q. Can you describe him?

A. Well, Deputy Sheriff Nash is a short fellow, not too husky. He wears glasses.

Q. When is the first time you saw Deputy Sheriff Nash in relation to this, as you were standing on the west side of Thompson Road?

A. When he arrested this one picketer and brought him

over to the west side of Thompson Road and put him in the car.

Q. Did you see him when he was on the east portion of Thompson Road?

A. Did I see him when he was on the east portion?

Q. Yes.

A. I may have seen him in the group of sheriffs, but I couldn't specifically point him out.

Q. If there was any physical contact between Harland Wallace and Sheriff Nash on the east portion of Thompson Road, you couldn't see it from where you were, could you?

A. On the east side?

Q. Yes.

A. Nash and Harland Wallace never met on the east side of Thompson Road.

Q. Was it difficult for you to see any engagement between the sheriffs and any employees who were on the ground?

A. At what time?

Q. While you were there on the west portion of Thompson Road?

A. While it took place on the west?

472 Q. That is right.

A. Like I said, I ran up to where it was taking place and dodging back and forth like this trying to sneak in and to take a picture, Wallace was in this drain ditch and then there was these other two sheriffs—

Q. Could you see what was happening down there?

A. They were swinging these little leather things, black jacks, whatever you call them.

Q. But you had difficulty seeing in there; isn't that so?

A. I had difficulty in seeing in there on account of the Sheriffs blocking it off.

Q. You didn't see Deputy Sheriff Nash and Wallace together, did you?

A. Deputy Sheriff Nash was coming back from making an arrest when this was taking place.

Q. But you weren't there and see any encounter between those two, did you?

MR. McMAHON: You assume there was an encounter.

MR. NAIMARK: I am asking if he saw any.

A. If there was an encounter, it was when Wallace was underneath the other two sheriffs.

Q. You didn't see it then?

A. No, I don't see how it could have possibly taken place.

MR. NAIMARK: All right.

MR. McMAHON: I have no further questions.

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474 DAVID HALSTEAD, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER MAHER: Please be seated and give your name and address to the reporter.

THE WITNESS: David Halstead, 228 Matty Avenue, Mattydale, New York.

DIRECT EXAMINATION

Q. (By Mr. McMahon) Mr. Halstead, one of the photographers said you invited him to step across the line and that you would do something to him, Gordon Dinger state. Do you know him; Gordon Dinger?

A. Yes, I do, as of the strike starting on March 2nd.

Q. And on some date between either March 28 and April 5th, or April 4th or April 5th, some time in the afternoon he states that you said to him to step across the line and that you would knock his block off, or some such other accommodation. Did you make any such statement or request to him?

A. No, sir, I didn't.

Q. How do you know Gordon Dinger?

A. Well, from every day experience, I picketed every day, and I had certain hours of picketing. I picketed 475 from six in the morning until approximately noon, and at the latest any day that I can remember I put in not later than one o'clock.

Q. You spoke to me before we came in here?

A. Yes, sir.

Q. Would you describe for the Trial Examiner the manner in which Mr. Dinger would take pictures of you?

A. Well, pretty near every day I would say for a good week's period that he followed me from one end of the picket line to another within two feet distance of pushing the camera right in my face and taking my picture, and it was kind of annoying.

Q. What did you do?

A. Well, I laughed and joked with him "Come on, take a good one", and I turned around and posed for him two or three times, and bent over backward to accommodate him for a picture.

Q. And then you bent over frontward and suggested a good view?

A. Yes, I said, "Here, take a good one."

Q. Other than that—

A. I had no other words with Mr. Dinger.

Q. Was there another time in the picket line when you left sooner than you normally leave?

A. Well, it all depended what the situation was at home.

There are different days I left at a quarter to twelve, 476 some days it was after twelve. We had a certain amount of mileage you got in and the morning bunch would go home.

Q. Did there come a day when one sheriff suggested you had better leave?

A. Yes, I believe that was the date of Wallace, the date that he was there and I came back in the afternoon, that afternoon and he come over in the picket line to me, and he said "Are you David Halstead?" I said "Yes, I am." He said, "Is your car here?" I said "Yes, it is over in the gas station". He said "You had better get going, you are the man to be picked up next", so I got in my car and got going.

Q. Did you hear the sheriff speaking about a quota to be picked up?

A. Yes.

MR. NAIMARK: Now—

MR. McMAHON: This is not cross examination. We want to show the circumstances under which these pickets lived, being harassed by deputy sheriffs, and what they know as one of these people just—They pick on pickets, we want to show, want the record to show where the sheriffs had a quota, and had a number to be picked up.

MR. NAIMARK: There is no issue here on this particular point, and it doesn't seem to be refuting anything that I brought out, the quotas of sheriffs, and so forth, is not germane. I don't understand the relevancy of this.

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CROSS EXAMINATION
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478 Q. But he started out the second week of the strike to take your picture?

A. Well, it might even have been the first week of the strike. I have no dates, but I know it was for several days he followed me up and down again, within two or three feet of me and the camera stuck in my face.

Q. Just follow the questions in order.

A. No reference of dates.

Q. He first started to take your picture about a week or two after the strike?

A. It might have been the first week.

Q. And did he come up and each day after that start to take your picture?

A. Definitely.

Q. Do you remember what part of the day he did this?

A. Mornings.

Q. In the morning, and so how long a period of time in the morning would he take the picture?

A. Well, it would be a matter of three to four minutes, the time you could walk the length of the picket line.

Q. Was this a moving picture or still?

A. A moving picture, yes.

Q. Did he take just your picture?

479 A. He was taking several pictures, by the time you walk the picket line, you are on the company property on one move, and the second time you are on the public highway, and as he come back, he would grab you again.

Q. Was he taking pictures of other people?

A. He was.

Q. How long after, either the first or the second week, whenever he started, how long did he continue to do this?

A. Well, I would say five or six days steady. He wouldn't let me alone.

Q. So would these five or six days be in order?

A. No, they were separated.

Q. Up until what period, was it in April?

A. Up until when they restricted us, whatever day that was, when they come to a thirty man picket on the front gate and six on the back. I don't know what date that was.

480 Q. Did you say to take a good look and agree to pose for him all the time when he first started?

A. From the beginning to the end I accommodated him all the way through.

Q. All the way through?

A. Yes. I never hid my face.

Q. You testified also, Mr. Halstead, that he was pushing the camera into your face, right?

A. He was within two or three feet, if that ain't pushing it in your face, how much closer can you come?

Q. I will accept it. You testified this was very annoying?

A. Very annoying.

Q. Will you please explain why, in the face of this being so annoying and pushing this in your face, you are agreeing to accommodate him until the very end?

A. Let's put it this way now. He was annoying. 481 Our company guards were annoying all the company people were trying to agitate us, and the sheriffs were agitating us, so I will put it in this sense, I didn't have, on the picket line, my face down on the ground, like I was worrying about something, I was in good spirits, whether he was annoying me or not. You can be annoyed and still be in good spirits.

REDIRECT EXAMINATION

Q. (By Mr. McMahon) You recall talking to one of the sheriffs out here in the hall involving an arrest? I am asking permission, it is not redirect, it is a new matter, just one question.

TRIAL EXAMINER MAHER: I will grant that permission.

Q. (By Mr. McMahon) Did you talk to one of the sher-

iffs out in the hall about the arrest of Francis Brewster on one day?

A. Yes, sir.

Q. And who was the sheriff?

A. Mr. Tedesco.

Q. Was that here in this hall here in this Federal Building?

A. It was right out here in the corridor.

Q. And what was the conversation, about the arrest 482 of Francis Brewster?

A. It was Tony Albanese and myself standing out there, and Mr. Potter was talking to Mr. Tedesco when this situation was discussed, so he come out and asked Mr. Tedesco how come they arrested Francis Brewster, because I was walking with him at the time he was picked up and I said "How come they picked up Francis Brewster? He wasn't doing nothing, he was taking pictures as he was walking along, and all at once Mr. Shaddock, the deputy sheriff, stepped out of the main line that they called it and said "We warned you to keep going, you are under arrest", and took him away, and I asked Mr. Tedesco, and he said "He was a marked man to be picked up. They were after Mr. Brewster from the beginning."

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CROSS EXAMINATION

Q. (By Mr. Naimark) Now, this last bit of testimony is testimony that you make with respect to Brewster, what Tedesco said to you?

A. That is all that we were talking about out there when he was mentioning about Mr. Potter swinging his

hand back and accidentally hitting him in the face, and this was in the conversation because I brought it in at that time and asked how come he arrested Mr. Brewster, the sheriff's department did.

Q. Mr. Tedesco told you what?

A. That Mr. Brewster was a marked man, that they were going to get Mr. Brewster.

Q. Do you know why? Did he say why?

A. No, he didn't know why.

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490 KENNETH LYON, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

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491 DIRECT EXAMINATION

Q. (By Mr. McMahon) Mr. Lyons, Joseph Puchalski, do you know him?

A. Yes, I do.

Q. He states he identified this gate as No. 4. At least he says it is the gate next to the railroad entrance, and that on March 3, at 7:30 P.M. you stopped him and asked to see a badge before he went through the gate.

A. At that time I was—

MR. NAIMARK: Wait. I don't hear any question.

Q. (By Mr. McMahon) Do you recall any such incident?

A. Yes, on March 3 I was on gate No. 2, and he passed me— He passed in and out through there steady every morning and evening, and I knew him and he said, "Hi,

Ken." when he went through, and I said, "Hi, Jo", and I knew he is salaried, and I don't recall asking him to see his badge because I knew he was salaried.

Q. What hours did you picket?

A. At that time I was there all day. I was getting there about 5:30 to 6:00 in the morning, and I was staying until about six at night.

Q. And so do you recall whether or not you were there on March 11?

A. Yes, I was there.

492 Q. About 3:15 in the afternoon?

A. Yes, I was there.

Q. And about how many pickets were there at that time?

A. At 3:15? Oh, at the railroad?

Q. No, this was—this would be the gate that Mr. Puchalski goes in and out.

A. Well, at 3:15 in the afternoon on gate No. 2 there was one picket there and it was my wife. I was down at the railroad at that time.

Q. Well, do you know if Mr. Puchalski used the same gate?

A. Well, he usually went in and out of gate 2 and he usually came out about four in the afternoon, at four. Went in—he was due in at 7:30 in the morning and he came out at four, and up until the time that Carrier management closed off gate 3 to people going in and out, he was using that gate.

Q. When was gate 2 closed off?

A. Well, it was about, well, the strike had been on for about a week. I couldn't give the exact time, but it was—they kept that gate locked and made everyone use the other gates, but up until that time people were going in and out the gate, gate 2, and Joe was using that gate until they closed it off.

Q. And then did you see him enter any other gates?

A. No, because I was staying down there, and I stayed on gate 2, well, up until the 27th of March, and after 493 that I had been on different gates and mainly the main gate.

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CROSS EXAMINATION

Q. (By Mr. Naimark) When you were at gate 2, Mr. Lyons, was it customary for you to stop and ask people for badges?

A. Most people that went through, as I was given to understand, the management informed them show their badges as they went through, and most every one was cooperative about it, and a good share of the people, and that I knew, anyway, because that was the gate I used and a lot of the fellows that worked that went, used that gate, and the majority of them I knew.

MR. NAIMARK: I move that the answer be stricken as not responsive.

TRIAL EXAMINER MAHER: Sustained. Please answer the questions.

Q. (By Mr. Naimark) Did you ask people for their badges?

A. Yes. I didn't ask Joe.

TRIAL EXAMINER MAHER: On my own motion I

move that the answer be stricken, Mr. Witness, please answer the questions:

Q. (By Mr. Naimark) Which people did you ask for badges?

A. Someone that I didn't know. Someone coming through, if he was a stranger, someone that I didn't recognize as working there, I would ask identification.

Q. Were there many employees that you didn't know the identification of?

A. Not too many going in that gate. I knew the majority (because that was at the end of the building where I worked.

Q. How is it that you were there asking people for badges, Mr. Lyons?

A. Well, it was a means of identification.

Q. But I mean by what authority were you there doing this? Did anyone tell you to do this?

A. No. Well, that was—the guards asked everybody for their badges when they went to work, and if a man showed his badge you normally knew he was a salaried employee, if he showed his badge as it was really—like it gives a chance to ask him why he was going through the picket line.

Q. Are you a guard?

A. I was a picket.

Q. A picket?

A. Yes.

Q. You were not a guard employed by Carrier, were you?

A. No, I was a Union man out there trying to get—

Q. Trying to get what?

A. Trying to get a Union contract.

Q. And is that why you asked people for their identification?

496 A. Well, that is normal procedure when someone crosses a picket line, to identify themselves.

Q. And if they didn't identify themselves, then what?

A. Nothing.

Q. You would just stop them from going on?

A. I stopped no one.

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REDIRECT EXAMINATION

Q. (By Mr. McMahon) I take it, Mr. Lyons, that if they were salaried employees or supervisors you know that there was no point in talking to them?

A. That is right.

Q. That if they were perhaps hourly rated employees you wanted to tell them your side of the story?

A. That is right.

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ARTHUR CALLAND, a witness called by and on behalf of the Respondents, being duly sworn, was examined and testified as follows:

TRIAL EXAMINER MAHER: Be seated and give
497 your name and address to the reporter.

THE WITNESS: Arthur Calland, 44 East Genesee Street, Baldwinsville.

DIRECT EXAMINATION

Q. (By Mr. McMahon) Mr. Calland, my notes indicate that a Mr. Lincoln from the company testified that he observed you on April 5 at the picket line at the main gate spit at a sheriff and kick at a sheriff whom he didn't identify. He did identify that you did the spitting and the kicking. Did you do either of those two acts?

A. No, I did not.

Q. Also Mr. Lincoln or somebody else says that on or about March 4 that you made a statement that after Monday you were going to stop the use of temporary badges?

A. No, I made a statement that I thought that after Monday there would be no more temporary badges going in there. I didn't say we were going to stop them.

TRIAL EXAMINER MAHER: Whom did you make that statement to?

THE WITNESS: To Captain Wood and Ruth Fitzgerald.

Q. (By Mr. McMahon) What was the reason for your thought?

A. Well, this fellow come up to the gate, this morning I was there and he had a temporary badge. He wanted to go in. He told me he was a Syracuse University student, that he worked part time at Carrier. I asked the fellow low if he was salaried or hourly. He said he was hourly, but working on a salaried position. And I told him I was on strike here and "I wish you would observe our picket line, please don't go in."

He said "I am not working in the plant, but operate in the blueprint library."

I said "That is something I don't know. I have never seen you before. Wait a minute."

He said "If I get somebody to identify me, the person I work for, will you let me in?"

I am not sure if he went to the gate and spoke to Captain Wood, or he went across the street and called Ruth Fitzgerald to come down, but I know Ruth Fitzgerald came down. I stepped in the main gate-house, I was allowed to go up on Carrier property and talk to Ruth—I have known Ruth for 15 years, we kid back and forth, and she said "Art, what is the matter, what is going on?"

TRIAL EXAMINER MAHER: Who is Ruth Fitzgerald?

THE WITNESS: She is a supervisor for the blueprint library.

I said "Ruth, there is nothing wrong at all, verify one thing. Is this man hourly or salaried?"

She said "He is a part time worker. He is working on a salaried job but being paid in hourly paid. And I joked a couple of times with Ruth and O.K'd it and in he went.

Q. (By Mr. McMahon) Were there other instances 499 when people would go by and the guards would tell them to come back and show their picket signs to the pickets, were you there ever any such time?

A. Would you repeat that again, please?

Q. When the—I used the words "picket signs". When people crossed the picket sign without showing their identification, and was there ever any instance when you were there and whether or not the guard told them to come back and show the identification?

A. That happened on several occasions. I can't give you any dates, but I was there most every day and night, and we did have a few smart alecs that would practically run through and the guards would stop them and send them back. The same with the automobiles, the guards would stop them and bring them back to us.

Q. And did any of the guards communicate that there was some notice or posting that people should stop and make themselves identified to the pickets?

A. A guard told me that the instructions had been issued inside the plant that people would show their badge before entering the plant.

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CROSS EXAMINATION

Q. (By Mr. Naimark) Your job, Mr. Calland, on the picket line—Was your job to inspect people as they came across the picket line?

A. My job—I am one of the officers in the Union. I am Recording Secretary in the Union, and we were there to keep peace, which we were instructed by our staff people, and that was the job that one—one of my jobs, the most important job.

Q. To keep peace?

A. To keep peace on the picket line as much as we could.

Q. I suggest you failed.

A. I don't think you were there to find out.

Q. Is one of your jobs, I ask again, to ask people for identification before going through the picket line?

A. No, it wasn't.

Q. No? Well, then, how come you said that no more temporary badges were going through?

A. Because I heard the statement passed.

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MR. McMAHON: I will refresh your recollection that what he said was "I think we are going to stop the badges"—

THE WITNESS: As of Monday.

MR. McMAHON: As of Monday, and so forth.

Q. (By Mr. Naimark) Well, what did you mean by the fact that you think you are going to stop the badges?

A. Well, from going around the picket line you pick up a lot of different stories from your own people, and from the company people and everything else, and that was a rumor that was going, so I carried the rumor.

Q. You mean to say that while you were on the picket line you yourself never asked anyone or never saw anybody ask any employees for identification?

A. Oh, yes, I have seen people asked for identification.

Q. You have seen it?

A. Yes.

Q. How about you, did you do this?

A. Did I do what?

502 Q. Ask anybody that crossed the picket line for identification?

A. A lot of times.

Q. And this would be to see if they had proper identification before you let them through the picket line?

A. To see if they were hourly or salary, that is all.

Q. On April 5th were you on the picket line?

A. Yes, I was.

Q. Did you see Mr. Lincoln there at that time?

A. No, I did not.

Q. At some time that day?

A. I see him in the morning. I didn't see Mr. Lincoln in the afternoon, not that I can recall at all.

Q. Approximately when in the morning?

A. Approximately I believe eight o'clock, 8:30 that is when I generally see him pull up with a station wagon and cruise around and bother the people a little bit and go on down the road.

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508 **FRANCIS BREWSTER**, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER MAHER: Please be seated and give your name and address to the reporter.

THE WITNESS: Francis Brewster, 120 Shonnard Street, Syracuse, New York.

DIRECT EXAMINATION

Q. (By Mr. McMahon) Mr. Brewster, were you at the railroad gate on Thompson Road March 11, 1960?

A. Yes, sir, I was.

Q. And what time did you arrive there?

A. 2:30 in the afternoon, or about that.

Q. Deputy Sheriff Tedesco says it was about 11:30 in the morning on that date, and he approached you and talked to you and you went over and told the people, that you went over and told the people to open the gate at 11:30 in the morning. I ask were you there at 11:30 in the morning?

A. At 11:30 I was at 104 Magnolia Street, the Steelworkers Headquarters.

Q. About how far from the main entrance is Magnolia Street?

A. I would say five miles.

Q. Mr. Lincoln testified on April 4th, either April 504 4th or April 5th, and I used the clock analogy, that some time in the middle of the afternoon that he was at six o'clock, and that Arthur Calland was at ten o'clock, and that he spit and kicked at a sheriff, and that you were at two o'clock in the picket line. Now, would you tell the trial examiner where you were on April 4, 1960?

A. Well, sir, at 11:36 on April 3 I was picked up by ambulance and transferred to Syracuse General Hospital as a respiratory case, and I was in the hospital on April 4th.

MR. McMAHON: Mark this Respondent's Exhibit 2.

(Thereupon, the document hereinafter referred to was marked Respondent's Exhibit No. 2 for identification.)

Q. (By Mr. McMahon) This will be Respondent's Exhibit 2. I show you Respondent's Exhibit 2 for identification, which purports to be a bill from the Eastern Ambulance Service, Inc. to Mr. Francis Brewster of 120 Shonard Street, Syracuse 4, New York. Is that you, sir?

A. That is me.

Q. And was this bill sent to you?

A. Yes, and Carrier paid the bill through my insurance.

505 Q. (By Mr. McMahon) You testified that you were picked up by the ambulance at 11:20, 11:26 P.M., April 3, 1960, at your home and taken to Syracuse Central Hospital?

A. That is right.

MR. NAIMARK: What time was he picked up?

506 MR. McMAHON: 11:26 P.M.

MR. NAIMARK: 26, all right.

Q. (By Mr. McMahon) And how long did you remain in the hospital?

A. I remained there—I couldn't give you the correct time I got out of there, but I paid one day hospital room and board.

Q. So you were there late at night?

A. That is right. And I got out—

Q. When did you get home?

A. The following day.

Q. About what time?

A. I couldn't tell you that either.

Q. And then what did you do?

A. I remained at home excepting going to Dr. Grover for the next two weeks.

Q. Did you go near the picket line at all?

A. No, sir.

Q. Were you served with papers at the State Court injunction action?

A. I was served by the U.S. Marshal while I was sick in bed.

Q. You were not on the picket line on or about April 4th or April 5?

A. No, sir.

Q. Or about April 3?

507 A. No, sir.

Q. Or April 6?

A. No, sir.

Q. On any day on or about that time?

A. No, sir.

508 Q. Do you know who the head of the plant security personnel is?

A. Yes, sir.

Q. Would you give it?

A. I was going to say John Lynch, but that isn't it. It is John Walsh.

Q. John Walsh, W-a-l-s-h?

A. That is right.

Q. And did you have a conversation with—is he called Charles Walsh?

A. No, I call him John Walsh.

Q. But as far as you know, he is head of the plant

509 security personnel for Carrier Corporation at the Thompson Road plant?

A. That is a known fact.

Q. And did you have a conversation with Mr. Walsh concerning the question of identification cards or badges?

A. Yes, sir, I did.

Q. And where did you have this conversation?

A. In the patrol building.

Q. And where is the patrol building located?

A. The patrol building is situated about 150 feet from the main highway, at the entrance to the plant.

Q. And would you tell us—and Mr. Walsh, you say, is the chief of plant security for the charging party?

A. That is right.

Q. And what did he say to you about badges, and what did you say to him?

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510 A. Mr. Walsh called on me and asked me to come to the patrol building. He sent a guard. I don't know just which one, so I went up and he asked me, he said, "Francis, I am asking you as a friend of the working man to pass the people that you do not represent in your bargaining unit into this plant, and I will agree with you that these people will be instructed to show you their badges."

Q. What did you say to that?

A. I said "We have no objection to the office workers going in there." And he said "And you live up to your end of this bargain, and I will live up to mine."

Q. And did you say anything to him about phony badges?

A. Yes, I did.

Q. What did you say to him?

A. I said to him "Well, now, listen, this is a serious situation, and we don't want you to try mailing badges on to people and try to bring them in here as office-technical workers, and we do not want you to try to bring in strike breakers, and we will check these people's badges, and if we find or recognize any of our people going in there, we are going to talk to these people and ask these people not to co-operate with you, and we will not promise to cooperate with you any longer, we will stop every car by walking slow, and until you identify these people and they identify themselves."

Q. So that you would then have—In other words, if he didn't keep this arrangement which he proposed, you were then going to stop every car and ask those people who would be in the bargaining unit to respect your picket line?

A. Yes, sir.

Q. Going back to this railroad entrance, Mr. Brewster, Sheriff Tedesco attributes to you a statement substantially as follows: That you stated that approximately at 11:30 or 12 o'clock that if that train went—first he said you told the pickets to let the train go in and then said, you then said to the train crew "Up to the right, don't go left." Did you make such a statement?

A. I was at 104 Magnolia Street during the hours as mentioned.

Q. Did you make that statement at any time?

A. No, sir.

Q. When you arrived at the railroad gate on March 11, 1960, at about 2:30 P.M. in the afternoon is that, am I correct?

A. Yes, sir,

512 Q. Where was the train then?

A. The train at that time—

Q. Or the engine?

A. Was back, oh, maybe 150 feet inside of the Carrier gate.

Q. Did you make the statement at that time that if the engine touched Carrier property you wouldn't let them come out?

A. No, sir.

Q. Do you know Louis Hosid?

A. Yes, sir, I do.

Q. Where is Louis Hosid now?

A. Louis Hosid, he is probably home now.

Q. Is he working?

A. Yes, sir, he is. He is working inside Carrier plant.

Q. Do you know about how long he has been so—

A. Yes, sir, I believe Hosid went in as soon as the gates were opened.

Q. What date would that be?

A. The 25th, probably.

Q. The 25th of March?

A. 23th of March.

Q. On March 9, at about 7:00 A.M., this Mr. Lincoln testifies that you were on duty—that he was on monitoring duty at gate No. 1, and that you were leading about 20 pickets and surrounded a car and asked that a badge 513 be shown and that you refused to admit the car on the premises until you saw the badge; have you any recollection of such an incident?

A. Well, my agreement was with the security officer that whoever might try to enter this plant would show their badge, and he also enforced this but if they pushed through—

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CROSS EXAMINATION

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519 Q. (By Mr. Naimark) Mr. Brewster, I see that you went to the hospital on April 3rd at 11 P.M., or approximately 11:30 P.M.?

520 A. 11:26.

Q. 11:26. And how long were you there?

A. I was there until April 4th.

Q. You were in the hospital from April 3rd until April 24th?

A. Until April 4th.

Q. April 4th? What time were you discharged April 4th?

A. I don't know what time I was discharged April 4th. I paid a full day's board and room.

TRIAL EXAMINER MAHER: What is the answer to that question?

THE WITNESS: That I don't know the answer, what time I was discharged. I gave that.

TRIAL EXAMINER MAHER: What was the answer? What time were you released?

THE WITNESS: I said I don't know what time it was, but I paid a full day's board and room.

TRIAL EXAMINER MAHER: You weren't asked that.

MR. McMAHON: He acknowledged it wasn't a good answer.

TRIAL EXAMINER MAHER: You do not know what time it was? Was it in the morning or the afternoon?

THE WITNESS: It was in the morning.

TRIAL EXAMINER MAHER: The morning of April 4th?

THE WITNESS: That is right.

Q. (By Mr. Naimark) What did you go to the hospital for?

A. Respiratory.

521 **Q. And you slept there overnight?**

A: Well, I can't tell you whether I slept or whether I didn't. The intern came in and took care of me, and as soon as I was mobile again, why, I asked to leave, and I went home.

Q. You went home that night?

A. No.

Q. Did you go home that night?

A. No, I went home in the morning.

Q. Then you know whether you slept there overnight or not.

A. Well, I don't know. I was under this—

MR. McMAHON: He was there.

MR. NAIMARK: That is what I am getting at.

Q. (By Mr. Naimark) Were you in bed there overnight?

A. Yes, I was there, yes.

Q. Now, I understood you to say you were not near gate 1, and we got into a discussion about that, that you were not near that gate at any time. Were you near the main entrance between March 11 and the latter part of April?

A. March 11? Until April 1, possibly I was.

Q. You were at the main entrance?

A. At the main entrance.

Q. What were you doing at the main entrance while you were there?

A. Picketing or visiting the picket captains or delivering coal. I had a number of things to do.

522 Q. When you were there did you have occasion to see Gordon Dinger there?

A. I wouldn't know Gordon Dinger if you put him in front of me.

Q. You don't know Gordon Dinger?

A. I don't know these fellows by name or by sight.

Q. Did you see any representative of management taking pictures near the entrance?

A. Yes, sir, I see a number of them, I thought it was a Hollywood lot.

TRIAL EXAMINER MAHER: Confine yourself to answering the questions, Mr. Brewster.

Q. (By Mr. Naimark) How many did you see taking moving pictures?

A. Oh, possibly twenty-five.

Q. Twenty-five people taking moving pictures?

A. Moving pictures.

Q. Now, you testified you had a conversation with Mr. Walsh regarding people coming in and out of the plant?

A. Yes, sir.

Q. When did you say that took place approximately?

A. March 3rd.

Q. March 3rd?

A. That is right.

523 Q. And do I understand correctly that he came down to speak to you?

A. He sent a guard after me to come to the patrol building for a discussion.

Q. And what is it he said again to you?

A. He made an agreement with me that we would—first he told me that we had no right to stop the office-technical workers and professional workers. He said "They are not in your bargaining unit."

Q. Had you been stopping them?

A. No, this is when the strike just started during the night, the previous night.

Q. All right.

A. And he said "Francis", he says, "I will ask you to live up to this agreement, and we will ask all our office-technical and professional workers to show you and your people, the pickets, their badges, and please don't turn them away or hold up the traffic so it will be backing out onto the highway."

Q. And he said that he would ask all the technical people to show you the badges?

A. That is right.

Q. All right, go ahead. Go ahead, continue.

A. Go ahead.

Q. That is all that was said?

524 A. Yes, that is what the man said.

Q. And you said?

A. I asked him (Walsh), I cautioned him, I said "This is a serious situation." I says "We don't want you bringing in any strikebreakers or sending out the badges to hourly workers to come in here under these office-technical workers badges, because we know the difference." They have a different color and they have an O for a number to start with.

"And", I said, "if you live up to your agreement, we will live up to ours, and we won't bother these people."

The plant was closed for three weeks. The company shut down, we had no purpose of stopping these people from going in to work.

Q. Well, you didn't want people to go in and cross the picket line and go to work, did you?

A. We didn't want our office—not our office, but our P & C - P & M workers going in unless we had a chance to talk to them and ask them not to go in.

Q. Were you trying to organize the office people as well?

A. Sir, I had no part in organizing office workers, I was working at production and maintenance workers.

Q. While you were on the picket line at the main gate, did you have occasion to notice the pickets stopping people trying to—the main entrance?

A. At the main entrance?

Q. That is right.

525 A. I had our pickets question people for their badges according to our agreement with the security officer, yes, sir.

Q. Well, isn't it true that your pickets were stopping people, all people who were coming through, whether they were hourly or salaried employees or not?

A. There wasn't any hourly workers going in.

Q. But isn't it true that they were stopping all people who were going through?

A. Asking for their identification badges which was part of the agreement with the security officer, that is true.

REDIRECT EXAMINATION

Q. (By Mr. McMahon) To clear up a question, on re-direct. On April, or in March, on March 11, 1960, you were at the railroad entrance on Thompson Road?

A. Yes, sir.

Q. And the train finally left about approximately four o'clock; is that—

A. That is approximately within fifteen minutes one way or another.

Q. And where did you go at that time?

526 A. I went up to parking lot No. 1 which is west of gate No. 2, and I talked with Ken Lyons, his wife, Leslie Carver, and two other pickets, and I wasn't too well acquainted with them, they worked in a different area than I did.

Q. About how long did you talk to them?

A. Oh, until John Kowalski came down and picked me up.

Q. Which was a period of about how long?

A. Maybe 15 minutes.

Q. Then where did you go?

A. I went back down to the hall.

Q. Did you go to the main entrance?

A. No, I hadn't been back to the main entrance.

Q. You did not go to the main entrance?

A. No, sir.

Q. You went directly from parking lot No. 2—

A. To John Kowalski's car, back downtown.

MR. McMAHON: I have no further questions.

RECROSS EXAMINATION

Q. (By Mr. Naimark) Do I understand that on March

11th at the railroad entrance you were only there a short time, did you say?

A. Yes, sir, from 2:30 until four o'clock.

Q. Pardon?

A. From approximately 2:30 until four o'clock.

MR. NAIMARK: All right, that is all.

527 JOHN KOWALSKI, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER MAHER: Please be seated and give your name and address to the reporter.

THE WITNESS: John Kowalski, 104 Magnolia Street, which is the business address, and my home address is 193 Parkside Avenue, Syracuse.

DIRECT EXAMINATION

Q. (By Mr. McMahon) Mr. Kowalski, are you a staff representative of the United Steelworkers of America?

A. Yes, I am.

Q. What is your present status, Mr. Kowalski?

A. I am getting some physicals and getting checked up and taking care of my health at the present time.

Q. Are you on sick leave, may I state it that way?

A. Yes, sir.

Q. But you were active, I think we will all agree, on March 2nd until several weeks ago when you had this relapse?

A. That is correct.

Q. And did you give instructions to the pickets as to how they were to comport themselves?

528 A. Not only did I give them verbal instructions, but I had instructions printed up.

MR. NAIMARK: I am going to ask that this witness be directed to reply to the questions that are asked.

TRIAL EXAMINER MAHER: I think he is doing that. You asked if he was giving instructions, and he is qualifying it by saying what kind, and I think the objection is out of order.

(Thereupon a document hereinafter referred to was marked Respondent's Exhibit No. 3 for identification.)

Q. (By Mr. McMahon) I show you Respondent's Exhibit 3 for identification, Mr. Kowalski, and I ask if you distributed that, if it was distributed?

A. Yes, it was handed out to all the pickets that did picket duty at the Carrier plants.

MR. McMAHON: I offer Respondent's Exhibit 3 in evidence.

TRIAL EXAMINER MAHER: Mr. Naimark?

MR. NAIMARK: Well, if it is offered for the purpose of establishing that he handed it out, if that is its purpose, I have no objection, but if it is offered for any other purpose, I do.

MR. McMAHON: Its main purpose is to show that the character of the instructions that were given—there are some other matters in there that are argumentative,
529 and I don't feel that your mind will be turned by those.

It was an entreaty in there for them to behave themselves.

TRIAL EXAMINER MAHER: Over General Counsel's objection Respondent's Exhibit 3 is admitted.

(The document heretofore marked General Counsel's Exhibit No. 3 for identification, was received in evidence.)

Q. (By Mr. McMahon) Mr. Kowalski, did you appear at the railroad entrance of the Carrier plant March 11, 1960?

A. Yes, I did.

Q. And what time did you appear there?

A. At approximately 2:30 P.M.

Q. And was Francis Brewster there when you arrived?

A. Francis Brewster came with me.

Q. So that if someone said that he was there before you, or you before him, it would be incorrect?

A. That is correct.

Q. You arrived at the same time?

A. We arrived in the same car at the same time.

Q. And that is how you know?

A. Yes, that is right.

Q. You were in the same car. Do you recall where you parked the car?

A. Yes, I parked it on Thompson Road off the shoulder of the road. I don't know. I think they call it the railroad gate.

530 Q. I show you General Counsel's Exhibit 6 in evidence. Is that the car that you were driving on that date?

A. Yes, sir.

Q. (By Mr. McMahon) And where did you park it again, John. I am sorry, I didn't hear it?

A. I parked it on Thompson Road going north.

Q. Facing north?

A. That is right.

Q. Then what did you do?

A. Well, I got out of the car because there was a lot of commotion and all kinds of photographs, and I believe people who stopped in cars along the road who were spectators, and there was a lot of milling around.

Q. Were there any deputy sheriffs there, John?

A. Yes, I think there were as many deputy sheriffs as there were spectators and pickets.

Q. Together?

A. That is right.

Q. And what did you do?

A. Well, I got out of the car and immediately some of the reporters and cameramen started to question me about what I thought about the Brotherhood not respecting our picket line, and I said I didn't know anything about it
531 until I heard it on the air, and that is why I was down there to investigate there and find out what it was, all this commotion was about.

Q. And when you arrived, if you recall, was this gate opened or closed?

A. I don't remember if the gate was opened or closed, because I believe the people were right there.

MR. NAIMARK: Mr. Examiner, I submit, I have heard this witness testify, that is why I made this comment that he should be asked to confine himself to answering questions.

TRIAL EXAMINER MAHER: I will direct the witness to answer the questions asked by Counsel.

Q. (By Mr. McMahon) You don't recall if the gate was opened or closed?

A. No, I can't recall it.

Q. Do you recall where the engine was?

A. After I had gotten out of the car, I do know the engine was inside the Carrier property.

Q. John, it has been alleged that you parked the car in the middle of the railroad tracks?

A. That may have been.

TRIAL EXAMINER MAHER: What is the answer?

Q. (By Mr. McMahon) "It may have been". Were you asked to move the car?

A. Not until after they had pushed the car back. The deputy sheriffs opened up a spot for me, oh, about 30 532 or 40 feet from where it was parked, and I backed it right into there.

533 Q. And was there a time, John, when some of the members, or some member of the railroad Brotherhoods approached you about the picket line at Carrier?

A. Yes, there was.

Q. Would you fix the approximate time and place?

A. I believe it was a day or two after the strike started, I believe it was about the 4th or 5th of March.

Q. And where?

A. At my office.

Q. And what was said?

A. A gentleman representing the Railroad Union came into my office and told me he had some coal to deliver to the Gessies Street plant, and he wanted to assure that the United Steelworkers of America, and including myself, that the Brotherhood was in 100 per cent sympathy with our cause. However, he pointed out to me that this coal not only was for Carrier Corporation, but was for General Electric that was housed in the building on Geddes Street, and I told him we had no objections and certainly was happy to hear that they were in sympathy with our cause.

Q. And did you have any other conversations with 534 any of the railroad Brotherhood from that day to this day?

A. No, I have not.

Q. And how long did the conversation take?

A. It didn't take very long. He left the room because I was quite busy, the phones were ringing like mad, and he excused himself and went and delivered the coal, I believe.

Q. Did you induce or encourage him not to deliver the coal?

A. Well, I didn't have to. He said that he was in sympathy with our strike, and assured me that the Brotherhood was also.

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535 Q. Now, a Captain Wood of the plant security personnel testified as to an incident in which you refused to let a car leave the plant unless you opened the trunk and permitted you to inspect it. You recall that incident?

A. I recall an incident of that nature. I couldn't tell you what day it was, and I believe Captain Wood was there. I believe it was pretty much after everybody had left the plant, there was a, there was just a few workers that were straggling out, and there was some questions that were raised about some of the smuggling of work 536 that is going out of the plant to other areas, and this seemed to disturb the pickets, and I tried to reassure them that it possibly wasn't so, it was nothing else but a rumor, so I asked that a couple of cars, or a spot check of some of the cars and asked to inspect the trunks, particularly where the rear end may be lower than normally should, and I do recall asking one of the gentlemen who was driving out of the plant, I believe he had two or three other riders with him, to open up the trunk of his car as he was waiting for the light, to get out onto Thompson Road, and he refused to do so.

Q. Well, this was off the Carrier property and on the point of entrance to the main highway?

A. No, it was on Carrier property. It was on Carrier property.

Q. I see. And he was waiting for the red light?

A. That is correct.

Q. And what did the man say to you?

A. He said he didn't think he had to open up his trunk; and I said "The pickets here are a little bit concerned about some stuff that is being hauled out of here by cars, and we are asking you to open up your trunk."

Q. What did he say?

A. He said "I won't do it unless I am instructed to do so." Just about then Mr. Wood appeared.

Q. And what did Mr. Wood do? Did he tell him he 537 didn't have to do it or he could do it?

A. No, Mr. Wood told him he didn't have to open up his trunk, and of course the picket line was still moving, and the light kept changing from time to time because the signal is there and it keeps changing, and the result was that the gentleman got out of the car, and he was allowed to open up the trunk, and he did open up the trunk, and without any incident of any kind he proceeded on through.

Q. Another witness testifies, John, that you were on the picket line on April 5 along with Francis Brewster who now testifies he was at home, but on April 5 at this main gate you were on the picket line, and Arthur Calland is alleged to have spit and kicked at a deputy sheriff. Do you recall witnessing any such incident?

A. I did not see the incident. I do recall the occasion because I was arrested that day myself, but later released.

Q. What do you know about the matter?

A. Well, there had been—

Q. Did you see anything?

538 I did not see Arthur Calland arrested until after the arrest was made, and both Bruno Luczynski who were down at the other end—

Q. Who is Bruno Luczynski?

A. He is a sergeant in charge of the—he is a detective sergeant who had been placed in charge of all the deputies at the Carrier picket line.

Q. Could you spell the last name, well, give a try at it?

A. L-n-c-z-y-n-s-k-i, I believe it is.

Q. You say you and Bruno Luczynski were down at the other end?

A. That is correct.

Q. Well, would that be at the south gate or the south entrance or the north entrance?

A. That would be at the north entrance?

Q. Well, Arthur Calland, and when you first observed him, was that the south entrance?

A. He is at the south entrance.

Q. Was Francis Brewster there with you on April 5th?

A. He was not.

Q. Had Francis Brewster communicated to you a conversation that he had had with Mr. Walsh, the head of plant security personnel?

A. Yes, he did.

Q. Concerning badges?

539 A. Yes, he did.

Q. And as a result was this information passed on to the other pickets?

A. It was.

Q. (By Mr. McMahon) Mr. Kowalski, would you tell me what you recall about what hour of the day on March 11, 1960, the train made its final exit from the property?

A. It was just about four o'clock.

Q. Would you tell us what you did after that?

A. Yes, I had my car parked down by the American Stores warehouse which is at the southwest of the railroad gate, and after having some conversation with some reporters who were still there, I finally got in my car and swung it around and picked Brewster up at the entrance to the parking lot across from the gate No. 2.

Q. And then where did you go?

A. We went back to the office at 104 Magnolia Street.

Q. Did you stop at the main entrance?

A. We did not.

Q. Do you know Captain Wood who was head of the plant security, or is the captain of plant security personnel?

A. I know Captain Wood, yes.

Q. Well, he testifies that at about three o'clock on the afternoon of March 11 that you testified that you were 540 not going to let any office personnel go in or out of the plant because of the dirty trick that had been played on you and that you were going to make Wampler and Company eat shit, did you make that statement?

MR. NAIMARK: Excuse me. What time did you say this was?

TRIAL EXAMINER MAHER: March 11th.

Q. (By Mr. McMahon) March 11th.

A. I never have made any such statement about Mr. Wampler.

Q. I am asking what you have already told me, but were you at the main entrance on March 11th?

A. No, I was not, I was at the railroad gate. I was there early in the morning.

Q. And you left from the railroad gate and went directly back to Magnolia Street?

A. That is correct.

Q. Is there any doubt about it in your mind?

A. None whatsoever.

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CROSS EXAMINATION
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541 Q. On March 11th when you came to the railway entrance, I believe you testified that you parked the car on Thompson Road; is that correct?

A. That is correct, heading north.

Q. And it was on the railroad tracks, wasn't it?

A. That I couldn't say whether it was or whether it wasn't.

Q. Well, I show you G.C. 6 and ask if you can identify that.

MR. McMAHON: He already has.

THE WITNESS: That is my car.

Q. (By Mr. Naimark) Now I ask you wasn't it parked on the railway tracks?

A. According to this picture?

Q. Well—Yes, according to that picture.

542 A. Well, I don't see any railroad tracks here, sir.

Q. You don't?

A. No.

Q. All right.

MR. McMAHON; The witness said it was on the tracks, he doesn't deny it.

Q. (By Mr. Naimark) You say you got out of the car and you say you were not asked to move your car until after it was pushed back, Mr. Kowalski?

A. That is correct.

Q. How long was it after you had been there that you were asked to push the car back?

A. Oh, probably a half an hour.

Q. And you say that for a half an hour nobody asked you to move the car?

A. That is correct.

Q. And where did you move it to?

A. There was an area that the deputies had someone else move out of there and had me park it there on Thompson Road possibly about twenty feet from where that car is parked there.

Q. In respect to G.C. 6, were you there at the time 543 that the sheriffs were surrounding and apparently touching your car?

A. Well, if I was, I probably was way over in this direction here somewhere talking with the reporters or someone. There is a big snowbank that I believe runs along here, and I was somewhere in the vicinity of that snowbank, or around the corner from that snowbank.

Q. Did you see the sheriff move your car?

A. No, I saw it was being moved, and I said Yes, it was my car, and the deputies asked to move it aside, when they made the place for me to move it into.

Q. Did the sheriffs move your car?

A. No, I moved my own car. I did not leave the keys in the switch, but the door was open and it was not—it was in gear, but not with brakes on, and they apparently wanted to move it, and they started to push it out of the way, not knowing whose car it was, and when he asked if it was my car, I went over and started it up and backed it into the area that the sheriffs had reserved for me.

Q. You testified that you had a conversation with Sergeant Chrysler?

A. That is correct.

Q. And you asked him if the function of the deputy was not to protect the people in health and safety; is that correct?

A. That is correct.

544 Q. When did you have any conversations, approximately how long after you arrived there?

A. After I was apprised of what had happened, that the trainmaster who I later learned to be Mr. Bowes had ordered the train, or the locomotive through the crowd with complete disregard for their safety.

Q. Well, now, Mr. Kowalski, were you there when the—did you have this conversation with him after the train or the engine proceeded outside the entrance, the gate?

A. This is after the engine was inside the plant, as I did not arrive until it was inside the plant.

Q. Was this conversation with him before it came out?

A. That is correct.

Q. And you were concerned with the fact that the train was jeopardizing the health and safety of the employees?

A. In accordance with what I was told.

Q. And what were you told?

A. I was told that the gentleman on the front of the locomotive was waving the train on through, or the locomotive on through with complete disregard for the safety of the people in front of it.

Q. Were you told also that the pickets themselves were trying to prevent the train from crossing?

A. They said that they were walking the picket line.

TRIAL EXAMINER MAHER: That doesn't answer the question. Were you told that they were stopping 545 the train?

THE WITNESS: I wasn't told by Sergeant Chrysler that they were, no.

Q. (By Mr. Naimark) Don't you know, as a matter of fact, that the pickets were trying to prevent the train from crossing Thompson Road and coming across through the gate?

A. Do I know this?

Q. Yes, don't you?

A. I do know that there was difficulty, and that is the reason why I went down to investigate.

Q. On March 11 I think you said you picked up Brew-

ster at the parking lot, and before that you went and picked your car up behind Acme; is that correct?

546 A. No, that is not what I said, Mr. Naimark.

Q. All right.

A. What I said was after the train had gone and pulled out of the gate, and the gate was locked, was approximately four o'clock, and my car was moved down to the Acme warehouse from the place that I had originally parked it.

Q. Who moved it?

A. This I don't know this. I don't know, but that is where I found my car.

Q. I see. And then you went and picked up Brewster?

A. After I picked up my automobile I went and picked up Brewster.

Q. What time was this?

A. This was approximately 4:15, 4:20, somewhere in there.

Q. Then you left and went to Magnolia Street?

A. That is true.

Q. Isn't it true you came back to the main entrance after that?

A. Not that I recall.

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552-A JOHN H. WALSH, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER MAHER: Please be seated and give your name and address to the reporter.

THE WITNESS: John H. Walsh, 43 East Elizabeth Street, Skaneateles, New York.

DIRECT EXAMINATION

Q. (By Mr. Naimark) Mr. Walsh, by whom are you employed?

A. By Carrier Corporation.

Q. And what is your position?

A. Director of Security and Protection.

Q. And for how long have you been so engaged?

A. Eight years.

Q. And what—

MR. McMAHON: Just a moment. Director of Security?

THE WITNESS: , Director of Security and Protection.

MR. McMAHON: Thank you, Counsel.

Q. (By Mr. Naimark) As Director of Security and 553 Protection, generally and briefly, what is your duty?

A. Well, essentially my work is to oversee the safety of our facilities in that we train the in-plant fire brigade people as uniform personnel throughout both our locations, both at Geddes Street and Thompson Road, and we are required by law to make sure that all personnel working on government contracts have a proper clearance.

Q. Now, do you know Francis Brewster?

A. Very well.

Q. Francis Brewster testified at this hearing substantially and to the effect that at the outset of the strike he had a conversation with you at which time you said or

asked him to permit certain technical or salaried employees to go into the plant, and that—I beg your pardon. Yes, that you asked him to pass these people into the plant, and that you told him that these people will be instructed to show you their badges; and that both of you agreed upon this arrangement and that it was in accordance with this arrangement that he asked people to identify themselves.

Did you ever make such an arrangement with Mr. Brewster?

A. Definitely not.

Q. Did you ever say to Mr. Brewster that the people would be instructed to show you their badges?

A. Again, definitely not, for the reason that I don't have that jurisdiction.

554 MR. McMAHON: I move to strike out that part.

The question called for a Yes or No answer.

TRIAL EXAMINER MAHER: The superfluous portion of that answer is stricken.

Q. (By Mr. Naimark) Did Mr. Brewster ever say to you "We will live up to our agreement if you live up to yours"?

A. No.

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CROSS EXAMINATION

557 Q. Refreshing your recollection by this document, Mr. Walsh, do you remember meeting with Francis Brewster in the guard shanty?

A. The only two meetings I had with Mr. Brewster in the guard shanty was the second of March which was a

Wednesday night, I believe, before the picketing activity took place at the front gate, and at that time I asked Francis Brewster if he wouldn't take his people out to the front gate, which he did, and the only reason I asked him because the Captain of the guards had been out there earlier about nine o'clock, and he wasn't getting anywhere, and when I went out and talked to Francis, he obliged and took the people to the apron on the main gate entrance.

Q. Well, that was the one meeting; when was the other meeting?

A. The second meeting was about three days later when some employee, hourly employee came in and he was having difficulty getting his tools, and Francis came in to the guard house, spoke to the guard on the gate, and the guard called me, and I came out and called the superintendent, and I said "Bring that man's tools up here." He had 558 five or six children, and he had a job and had to feed them or something, and that is the only two occasions I talked to Francis Brewster in this entire period.

Q. (By Mr. McMahon) Where did you make this statement, Mr. Walsh?

A. Where did I make what statement?

Q. This one, this document here, physically; where, were you physically when you made that statement?

A. I made this statement in the presence of our legal people. In fact—

Q. Including who?

A. The statement was such that I didn't—

TRIAL EXAMINER MAHER: Will the witness

please confine himself to answering questions and not giving us a speech with every answer?

A. Well, I made this statement to our legal department, Mr. Walter Iles, and I believe Mr. Greene was there. I am not sure.

Q. (By Mr. McMahon) And you made this on the 14th day of March, about three days later?

A. Yes.

Q. After this alleged incident that you described?

559 A. That is right.

Q. Now, you say that on March 2nd, before the strike, before the actual walkout you had a discussion with Francis Brewster where?

A. Right in front of the security building or the guard house.

Q. And what did you say to him?

A. I said to him that it was very evident that these people were walking out and I would suggest that he take them to the perimeter of the property.

Q. And was there any discussion at all about identification badges, either from him or from you?

A. None whatsoever.

Q. Did he even mention the subject?

A. No.

Q. Had you discussed this subject amongst management about the use of identification cards or badges?

A. The only discussion that—I don't remember any discussion. Identification is a must.

560 Q. It has been stated here that some of the guards called personnel back and asked them to display their identification to the pickets so there wouldn't be any confusion about it. Would you know anything about that?

A. Not that I know of, but it could happen. I wouldn't deny that a guard might do that.

Q. And it seemed to be a regular course and practice of people displaying their identification cards to the picket?

A. Is it what?

Q. I said it appears—there is some testimony here to support the statement that people did in fact engage in the practice of displaying their identification cards to the pickets on a voluntary basis. Would you know anything about that?

563 Q. (By Mr. McMahon) Did you ever have a discussion with Mr. Kowalski in the presence of Mr. Caland on the subject of displaying badges?

A. Yes.

Q. Would you tell us what that discussion was and where it was and—

A. Again at the front gate, the main gate, it was about eight o'clock in the morning, and our salaried people were coming off the job.

Q. About what date?

A. I would think it was about the 7th, it was in the second week of the strike. And this young lady got off the bus, and the picket line turned around and wouldn't let her through, and she had what we call a temporary badge and John at that time was wearing a red hunting jacket.

and red cap, and I turned to him and said "John, this girl is a salaried employee." He said "Well, it is all right for her to go in." And Francis Brewster was there at the time, and he was a little bit annoyed by the fact that John was exercising authority, I guess, and so he said to me at that time "Can I talk to you about these badges?"

Q. Who said?

A. And I said "Yes." Mr. Brewster.

Q. John Kowalski?

564 A. John Kowalski. He said "Can I talk to you about it?"

Q. Yes. What did you say?

A. I said "Sure", and we went back to the guard house and John asked me if we could bring a list of hourly employees, and I said I had no such list, but I could check, and I called in to our personnel department and talked to Mr. Allen Sherman, and he said "No, we do not give out a list of our employees to anybody". And with that Art and John both turned around and walked out of the building, and that is the only time I talked to him about anything in the way of passes.

565 JOHN KOWALSKI, a witness called by and on behalf of the respondent, having been previously duly sworn, was recalled and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. McMahon) Mr. Kowalski, do you recall when you and Mr. Calland and Mr. Walsh discussed the subject of temporary badges?

A. That is correct.

Q. And could you fix the time?

A. It was approximately March 7th or 8th which was the second week of the strike, or it was over the week end. It was either the first or second day of the following week, and some questions had arisen about many temporary badges being shown and displayed to the pickets, and the pickets were stopping some of these people who 566 had the newer temporary badges, and Mr. Walsh came out to talk to me about it and I wanted to know how many of these new temporary badges were issued because it was confusing the pickets, they certainly knew what the old temporaries were as opposed to the regular badges, and rather than talk outside on the curb with a gathering around, we went inside the building, and that is the security building, and Mr. Walsh did call someone on the phone trying to get a list of people to whom temporary badges were issued, and he told Mr. Calland and myself that he wanted to straighten out this matter long before this thing started and get permanent badges issued to all of the people, that this was a confusing situation, he didn't blame us for certainly stopping these people who were there. However, he couldn't give us the list.

.

Trial Examiner's Exhibit No. 1.

AMEND PARAGRAPH XIII AS FOLLOWS:

- (a) *Add*—Ray Antolini—March 11, 1960
 Kenneth Lyons—March 11, 1960
 David Halstead—Between March 11 & April 4, 1960
 Irving Talbot—Between March 11 and April 4, 1960
 "John" (first name being unknown) Hunkins—
 Week of April 17, 1960
- (b) *Delete*—Joseph Larkey and date set opposite his name
 Ralph Baker, Jr. & date set opposite his name
 Howard Schultz & date set opposite his name
- Add* —Dominick Albanese—March 11, 1960
 Kenneth Lyons—March 11, 1960
 John Kowalski—March 11, 1960
- (c) *Add* —Arthur Calland—March 2, 4, 1960
 Roach—April 4, 1960
 Kenneth Lyons—March 3, 1960
- (d) *Add* —Jay Sherman—March 11, 1960
 Louis Hosid—March 11, 1960
 Paul King—March 11, 1960

By adding clause (e) to read as follows:

Assaulting and inflicting physical injury and harm to various individuals, in the presence of various employees of Carrier and officers or representatives of Respondent Unions, at entrances to the plant of Carrier and at the entrance to the premises of New York Central adjacent to the Carrier plant on Thompson Road, in Syracuse, N. Y.

Roger Potter—March 11, 1960
 Arthur Calland—April 5, 1960
 Harland Wallace—April 4, 1960

305.

General Counsel's Exhibit No. 2.





307

General Counsel's Exhibit No. 4.





309

General Counsel's Exhibit No. 6.



310

General Counsel's Exhibit No. 7.



BEFORE THE
NATIONAL LABOR RELATIONS BOARD

• • • (Caption—3-CC-106 and 3-CB-439) • • •

WILLIAM NAIMARK, Esq., JOHN GALVIN, Esq.,
and ROBERT MILLER, Esq., of Buffalo,
N. Y., for the General Counsel.

THOMAS P. McMAHON, Esq., of McMAHON AND
CROTTY, Buffalo, N. Y., for the Respondent
Union.

ISADORE GREENBERG, Esq., of Syracuse, N. Y.,
for the Respondent Local No. 5895.

JOHN E. LYNCH, Esq., of HANCOCK, DORR,
RYAN AND SHOVE, Syracuse, N. Y., for the
Charging Party.

Before: THOMAS F. MAHER, Trial Examiner.

**INTERMEDIATE REPORT AND
RECOMMENDED ORDER**

STATEMENT OF THE CASE

Upon charges filed on March 14, 1960, by Carrier Corporation, Charging Party herein, the Regional Director for the Third Region of the National Labor Relations Board, herein referred to as the Board, issued a consolidated complaint on April 8, 1960, against Local Union No. 5895, United Steelworkers of America, AFL-CIO; United Steelworkers of America, AFL-CIO; John Kowalski, Staff Representative of the United Steelworkers of America, AFL-CIO; and Francis Brewster, President of

Local Union No. 5895, United Steelworkers of America, AFL-CIO, herein referred to collectively as Respondent, alleging violations of Section 8(b)(4)(i) and (ii)(B) and Section 8(b)(1)(A) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519) herein called the Act. In its duly filed answer Respondent,¹ while admitting certain allegations of the complaint, denied the commission of any unfair labor practice.

Subsequent to the issuance of the complaint herein the Regional Director, pursuant to Section 10(1) of the Act, instituted in the United States District Court for the Northern District of New York injunction proceedings entitled *Thomas Ramsey, Acting Regional Director; etc. v. Local Union No. 5895, United Steelworkers of America, AFL-CIO, et al.*, Civil No. 8022. Hearing thereon was held on April 8, 1960, before Judge Stephen W. Brennan, United States District Judge. Findings and conclusions were made public on April 16, 1960, finding reasonable cause to believe violations of the Act had been committed and an order was issued on the same date granting certain temporary injunctive relief pending final disposition of the matter before the National Labor Relations Board.²

Pursuant to notice a hearing was held before me on May 10, 11, and 12, 1960, at Syracuse, New York. All parties were represented at the hearing and were afforded full opportunity to be heard, to introduce relevant evidence, to present oral argument, and to file briefs. The General Counsel presented a brief oral argument at the hearings in lieu of filing a brief with me. Counsel for Respondent and the Charging Party waived oral argument and in lieu thereof filed briefs with me thereafter.

1. Unless specifically noted otherwise Respondents herein will be collectively referred to as "Respondent."

2. 46 LRRM 2050.

It would appear from credible documentary evidence presented by Respondent at the hearing that certain of the allegations in the instant complaint, namely the acts and conduct alleged to be in violation of Section 8(b)(1)(A) of the Act (*infra*, p. 8) were the subject matter of a proceeding had before a justice of the New York State Supreme Court wherein the defendants in the action, Respondents herein, were ordered to refrain from certain of the conduct complained of and restricted in certain other of their actions and activities as they related to a labor dispute then in progress at the Carrier Corporation plant, the situs of the conduct which forms the subject matter of the instant proceeding. Contrary to the contention of Respondent the pendency or adjudication in a State court of the subject matter of a charge and complaint before the Board pursuant to Section 10(b) of the Act does not serve to render the matter *res adjudicata* or otherwise estop the Board from hearing and determining the merits of the action before it.³

Upon consideration of the entire record before me, and the briefs of the parties, and upon my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. The business of the Employer

Carrier Corporation is a Delaware corporation maintaining its office and principal place of business at Syracuse, New York, where it is engaged in the manufacture of air-

3. Cf. *Capital Services Inc. v. N. L. R. B.*, 347 U. S. 501; *N. L. R. B. v. Thayer Company*, 213 F. 2d 748, 754-755 (C. A. 1); *N. L. R. B. v. International Woodworkers of America, AFL-CIO*, 243 F. 2d 745, 748 (C. A. 5).

conditioning, refrigeration and heating systems. In the course and conduct of its operations at Syracuse, New York, Carrier Corporation, during 1959, caused to be manufactured, sold and distributed products valued in excess of \$1,000,000 of which products valued in excess of \$50,000 were shipped from said plant in interstate commerce directly to States of the United States other than the State of New York. It is admitted that the Corporation is engaged in commerce within the meaning of the Act and I so find.

It is also admitted that the New York Central Railroad Company, herein called the New York Central, is an interstate carrier engaged, among others, in the hauling of freight, and is a person engaged in commerce under the Act.

II. The labor organizations involved

Local Union No. 5895, United Steelworkers of America, AFL-CIO and United Steelworkers of America, AFL-CIO are labor organizations within the meaning of Section 2(5) of the Act.

III. The issues

1. Whether there is substantial evidence that the several Respondents induced and encouraged individuals employed by the New York Central to refuse in the course of their employment to transport or otherwise handle goods, articles, materials or commodities or perform services for the New York Central with the object of forcing or requiring New York Central to cease transporting the products of or otherwise doing business with Carrier Corporation.

2. Whether there is substantial evidence that Respondents have threatened, coerced and restrained the New York Central for the foregoing objectives.

3. Whether there is substantial evidence that the several Respondents restrained and coerced employees of and

individuals employed by Carrier Corporation and the New York-Central in the exercise of their statutory rights.

IV. The unfair labor practices

A. INTRODUCTORY FACTS

On May 2, 1960, after a period of fruitless negotiations between the Carrier Corporation and the Respondent Local, the certified representative of Carrier's employees at the Company's plant located at Thompson Road, Syracuse, New York, these employees went on strike. Directing this strike activity were Respondents John Kowalski, Staff Representative of the Respondent Steelworkers, and Respondent Francis Brewster, President of the Respondent Local No. 5895. Under their leadership picket lines were established at numerous entrances to the Carrier plant and at an adjacent railroad gate to be described in fuller detail hereafter. Other officials of the Respondent Local were, as will also be noted hereafter, active in the maintenance of picket lines thus established, and in addition picket captains were appointed to serve on various shifts and at various locations throughout the period of picketing activity.

Carrier Corporation, for its part, also established and maintained an organization for the purpose of dealing with problems and incidents arising out of the strike situation. Thus, a headquarters outside the plant was established at the nearby Sheraton Motel and from it were dispatched a corps of monitors whose duty it was to protect the interests of Carrier personnel and property *vis a vis* the pickets, and a corps of photographers working in conjunction with these monitors, whose duty it was to "document" the strike and picketing activity. Located at its motel headquarters were representatives of Carrier who were available to advise and assist working employees seeking entrance to

the plant; and secretaries whose duties included the transcription of statements made by employees and others whose experiences at or near the picket line were deemed worthy of record for future purposes, including the instant proceedings. Prominent in the establishment of policy respecting security matters and its execution were John H. Walsh, Carrier's Director of Security and Protection and David Wood, the Captain of Security and directly in charge of the 30 guards regularly employed by the Company. Supplementing the security precautions taken by the foregoing officials resort was frequently had to the Sheriff of Onondago County, whose uniformed deputies were frequently dispatched to the area abutting the Carrier property at Thompson Road.

B. THE RAILROAD SIDING INCIDENT

1. *Sequence of events*

South of the Carrier plant and extending in an east-west lateral was a spur of the New York Central, running easterly from the so-called Lake Line of the railroad across Thompson Road. This spur serviced numerous plants in the adjacent area, including Carrier, Western Electric Corporation, General Electric Corporation, and Brace-Mueller-Huntley, Inc., a corporation whose property and warehouses were directly to the south of Carrier, being separated only by the railroad right-of-way.

Ownership of this right-of-way was hotly contested at the hearing. I find that at all times relevant ownership herein was in New York Central and that its property extended east from Thompson Road between the southern boundary of Carrier Corporation property and the northern boundary of the Brace-Mueller-Huntley property and included the area upon which the railroad's tracks ran from Thompson Road at a width of approximately 35 feet.

MICRO CARD

TRADE

MARK



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beginning at the road and continuing, at that width, easterly for the length of the Carrier property, except as irregularly altered by the spur lines running into the several properties served by the railroad.

My finding with respect to the New York Central's ownership of its right-of-way rests upon the following documents set forth with more particularity in the record: (1) A certified deed from Defense Plant Corp. (R. F. C.) conveying the plant property to Carrier Corp., and including a description, in metes and bounds, of its southernmost boundary, (2) a certified deed from Carrier Corp., conveying to the New York Central the right-of-way in dispute, and including a description, in metes and bounds, of the southernmost boundary of the conveyed property, coinciding exactly with the southernmost boundary of the property previously conveyed to Carrier, and described above, and (3) a survey map of the Brace-Mueller-Huntley property abutting the original Carrier property to the south, which survey designates the northerly boundary by metes and bounds so as to coincide exactly with the southerly bounds of the property conveyed to the railroad, the survey having been physically checked and verified by a land surveyor, Robert E. Bedworth, who testified credibly before me.⁴

4. Objection was made that the ownership of the property was not established on the record by the more circuitous procedure required by the New York State Rules of Civil Practice. In overruling this objection I must note that although I am required to follow applicable rules of evidence "so far as practicable," practicality does not oblige me to require that proof of the commission of unfair labor practices under the Act adhere to the strict procedures of conveyancing real property under state law. Cf. *N. L. R. B. v. Local Union No. 1418, General Longshore*

The railroad right-of-way was enclosed by a chain link fence along its south boundary, which fence was a continuation of one enclosing the Carrier property along Thompson Road. Access to the right-of-way from Thompson Road was provided by a chain link gate. This gate was padlocked when not opened for railroad switching, and the key to the gate was in the possession of railroad personnel.⁵ Carrier personnel were not permitted access to Carrier property through the railroad gate and right-of-way.

During the early days of the strike it does not appear that the railroad regularly switched cars at Carrier,⁶ but regular service to the other plant along the right-of-way continued and deliveries of coal to General Electric were made to a site leased by that corporation from Carrier and located on Carrier property.

On March 10, arrangements were made with the railroad for the switching of freight cars at the Carrier plant.

Workers, 212 F. 2d 846, 851 (C. A. 5). In any event, however, the Board had recently held that in such circumstances as are present here title to real property is not controlling. *Union de Trabajadores de la Gonzalez Chemical Industries, Inc.*, 128 NLRB No. 116.

5. That the keys to this gate were at one time, specifically during the Korean conflict, retained by Carrier for security reasons is of no relevance to the instant controversy.

6. John J. Bowes, New York Central Railroad Train Master for the Syracuse territory, who testified credibly at the hearing, explained that the rank-and-file railroad employees, members of the several railroad labor organizations known as the Brotherhoods, were not disposed to cross picket lines at struck plants such as Carrier. This action by railroad employees is not an issue in this proceeding.

Fourteen cars were prepared for movement from the plant and a like number of "empties" were to be "spotted" in their place at the plant. This movement was scheduled for the following day, March 11, and was to be made by railroad supervisory employees so that any conflict between the railroad and the Brotherhoods would be avoided.⁷

On the morning of March 11, the regular train crew proceeded with its usual switching operations at Western Electric, General Electric, and Brace-Mueller-Huntley, and upon the conclusion of this operation returned the locomotive to a location on the main spur west of Thompson Road where it picked up the 14 empty boxcars requested by Carrier. At this time railroad management personnel, under the direction of Train Master Bowes, took over the operation of the train and proceeded toward the Carrier plant. Because the train on this occasion will be shown to have made several passages through the gate it should be explained that the pickup of loaded cars and the "spotting" of empty ones involves a series of switching maneuvers. Just inside the gate the single track spur line becomes a double track, the second and parallel track being referred to as the "runaround" track. To switch cars from one track to the other, clearing the switch each time, it was necessary for the train to go west and into, and sometimes across, Thompson Road. It was during the course of these several passages through the gate and onto the street that the following incidents occurred.⁸ As the

7. The credited testimony of Train Master Bowes.

8. Because further description of the several passages of the train in the course of the switching operations will serve only to whet the interest of the reader as to how it was accomplished and become a distraction from the principal subject matter herein, no further reference will be made to the precise train movements.

train approached Thompson Road from the west a group of men, many of whom wore insignia identified as Steelworker buttons, congregated on the track and right-of-way on the west side of the street opposite the railroad gate abutting the Carrier property. On the east side of the street several feet south of the track a sign nailed to a stick and bearing the inscription "This Plant on Strike, United Steelworkers of America," was stuck in a snowbank. The passage of the train across Thompson Road on its first approach to the plant under supervisory operation⁹ was accomplished only after the pickets walking or standing in front of it were dispersed, and then it was necessary for it to "inch" its way across the road to avoid injury to them.¹⁰

In all, including the above-mentioned passage, the train passed to or over Thompson Road under supervisory operation four times. After crossing to the fence-enclosed portion of the right-of-way, depositing the empty cars, and picking up the loaded ones the switching operation required the train to pass through the gate going west and extend partially onto Thompson Road. Again pickets obstructed the passage of the train making it necessary for train police and Sheriff's deputies to force the milling men from in front of the engine. Thereafter, between moves of the train, Respondent Kowalski, by his own admission, drove his automobile onto the track and parked

9. The train had previously entered the spur east of Thompson Road under the operation of its regular crew for the purpose of making deliveries and pickups at plants other than Carrier (*supra*).

10. Respondent Kowalski's testimony that on this and subsequent passages the train was handled in disregard of the safety of the pickets is not credited as being contrary to the testimony of credible witnesses.

it there. And before the train could continue its switching operation onto Thompson Road the Sheriff's deputies were obliged to push Kowalski's car off the track and to the south. Finally, after the empty cars had been "spotted" on the Carrier spur tracks and the engine had picked up the cars loaded for shipment it proceeded through the gate, going west, and attempted to make its final passage across Thompson Road. The pickets again sought to obstruct the train, shouting at the operators of the engine and lying down on the track and having to be lifted out of the way. Respondents John Kowalski and Francis Brewster were present at this time and were mingling among the men, Kowalski being "approximately a foot and a half away from the front draw end of the engine." In addition to these two, Train Master Bowes identified one Louis Hosid, a conceded picket and member of the Union, as having been in the forefront of the milling group and as having challenged Bowes to get down off the engine "for the purpose of getting my block knocked off."

After the train had successfully negotiated its final westward passage over Thompson Road the supervisory crew noted that three rail lengths of track, consisting of both the north and south rails, had been greased. They further noted that a track switch from the main track onto a spur leading into the warehouse of American Stores Co., located diagonally across Thompson Road from Carrier, had been thrown in such a way that a train, including the one involved here, would have been derailed if permitted to pass over the switch. While Train Master Bowes testified credibly that he had no knowledge of who were responsible for these acts of vandalism and the blame has not been otherwise placed, I deem it of significant relevance to note that the acts were perpetrated at approximately the same time

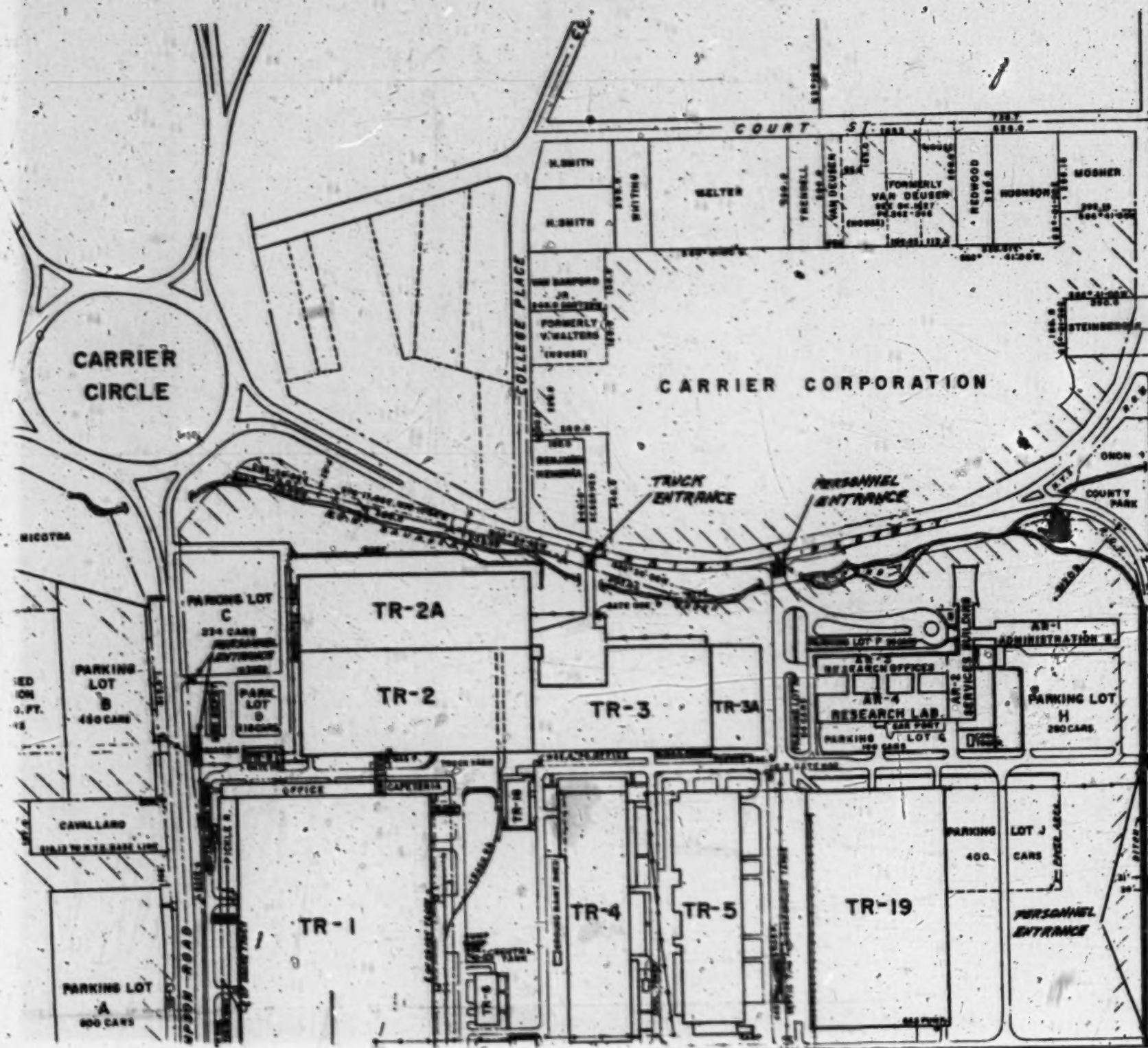
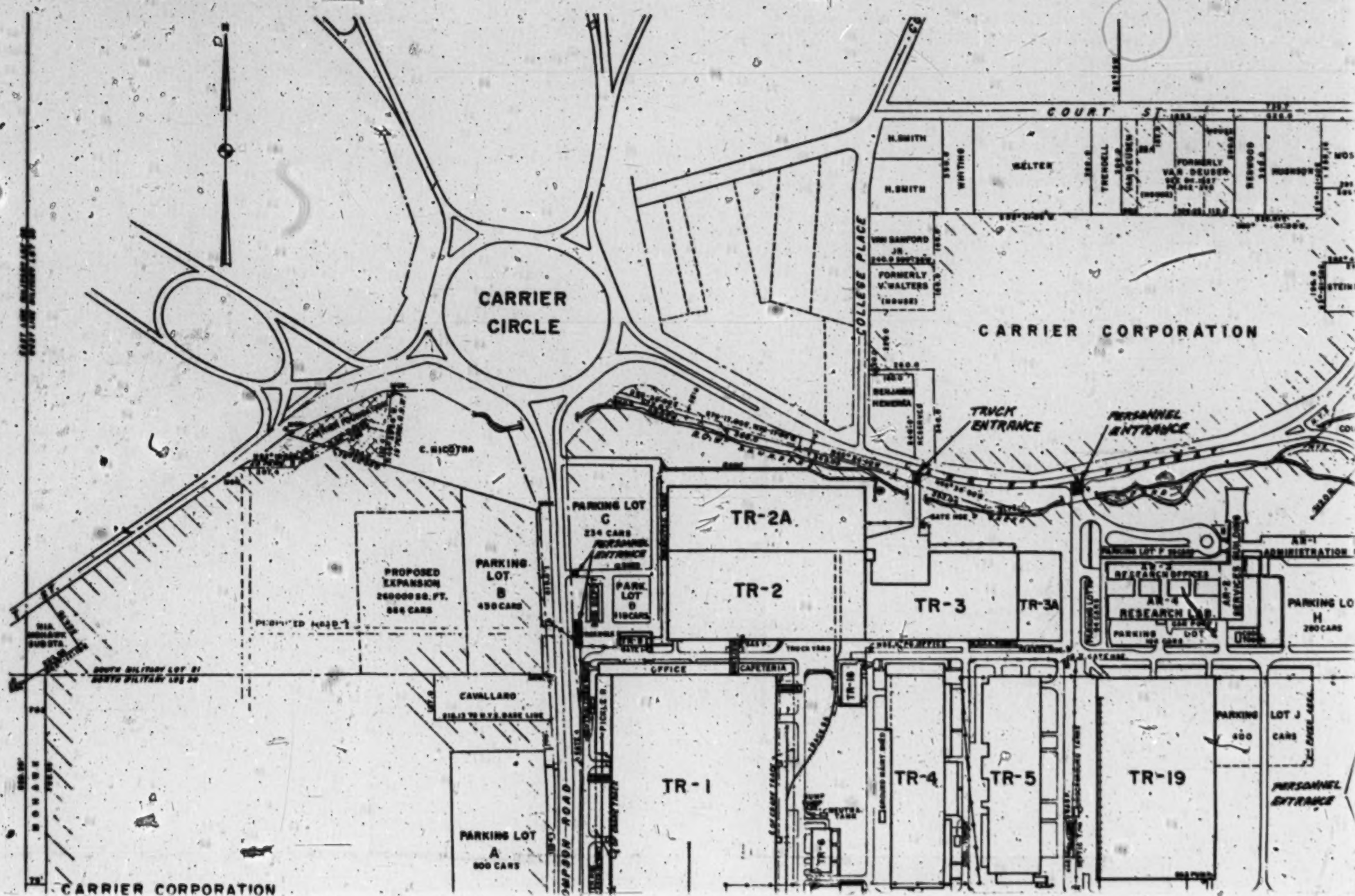
as was the obstruction of the train, detailed above, and in the same immediate location.¹¹

2. Conclusions

It is alleged that by the foregoing conduct of the Respondents, having authorized, established and maintained pickets at the premises adjacent to the Carrier, thereby ordered, instructed and appealed to employees of and individuals employed by the New York Central to cease work for their employer. A review of the facts set forth above clearly demonstrates that such picketing occurred on the afternoon of March 11, 1960, on the premises owned by the New York Central and that it was directed at those individuals whose assigned duty it was to operate the train at that time, as it made its several passages over the picketed railway right-of-way for the purpose of picking up and delivering railroad cars at the Carrier plant.

It is clear from the foregoing including the threats made to Train Master Bowes, and to other employees of and individuals employed by the railroad, as detailed herein (*infra*, p. 13), that the Respondents Steelworkers and Local 5895, as well as their respective agents, Respondents Kowalski and Brewster, thereby induced and encouraged

11. The foregoing account of the incident at the railroad gate on March 11 represents a composite of the credited testimony of Train Master Bowes, Deputy Sheriff Tedesco, Guard Captain Wood, and Employees Gordon Dinger and Hugh Lincoln. Dominic Albanese, the captain of the pickets on the day in question, and whose testimony I do not otherwise credit (*infra*, p. 15) substantiated generally the account of the train obstruction. Nor does anything in the testimony of either Kowalski or Brewster, neither of whom I credit (*infra*, fn. 17 and 19), dispute the finding I have made concerning this incident.



REFERENCE DRAWINGS

PEM-TR-3193 RECONSTRUCTION PROGRAM FOR HIGHWAYS ADJACENT TO CARRIER

PEM-TR-3190 SAME AS ABOVE

PEM-TR-3200 PART OF LOT 31-DEWITT-OWEN CO.

PEM-TR-3216 FRANKLIN PARK ON S.W. LOT 31

PEM-TR-3235 ALMONT PARK LOT 30

PEM-TR-3246 PART OF LOTS 21822 L.W. COTTRELL

PEM-TR-3256 SAME AS ABOVE

PEM-TR-3262 PART OF LOTS 21830 DEWITT-OWEN CO.

PEM-TR-3276 PROPERTY OF S.W. LAND DEVELOPMENT ON LOTS 31-3230-31

PEM-TR-3280 PARCEL LANDS OF WESTERN ELEC. CO. PART OF LOT 30

PEM-TR-3286 PARCEL "A"

PEM-TR-3300 PARCEL "B"

PEM-TR-3310 R.R. - R.O.W. S.W. JCT. R.R.

PEM-TR-3322 CARRIER THOMPSON ROAD PLANT LOT 30

ME-TR-1990 PROPERTY OF CARRIER CORP. NORTH OF TR-1

ME-TR-1960 CARRIER CORP. LOTS 29 & 30

ME-TR-430 LAND SOLD TO N.Y. CENTRAL R.R.

PEA-TR-2110 PARKING LOTS E-F-P-S-H

PEA-TR-3562 PARKING LOTS

PEA-TR-1740 ALMONT TRACT

PEA-TR-2196 LAND OF CARRIER

PEA-TR-2122

ME-TR-1940 TRANSMISSION LINE EASEMENT NIAGARA-MOHAWK

PEX-TR-19-0036 R.R. TRACK PLAN MAP NO. 182... O.S. ONION CO. SANSEWER R.O.W. DOCUMENT

MAP NO. 180

MAP NO. 249

LEGEND

SPRINKLER TRAFFIC LIGHT

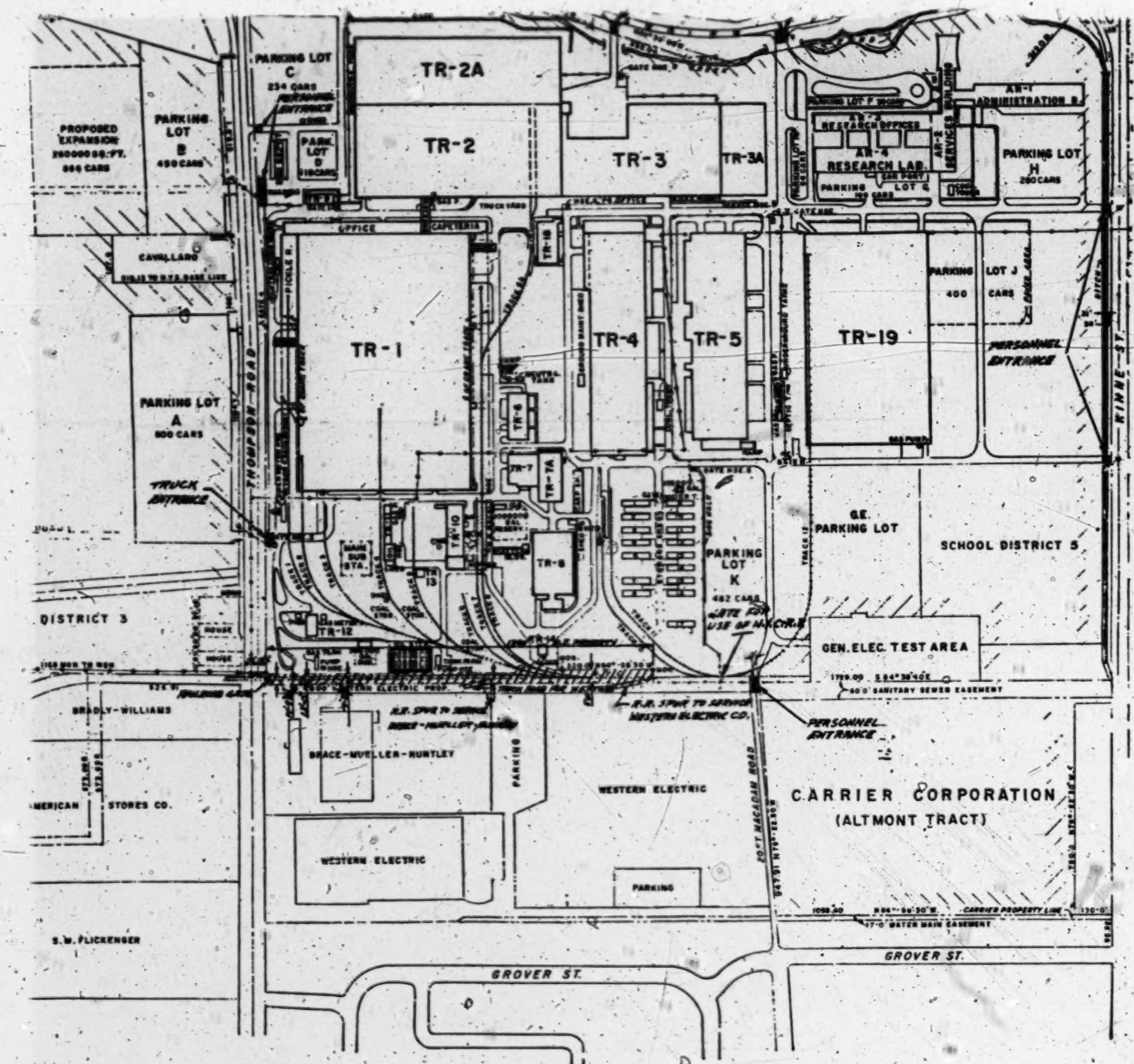
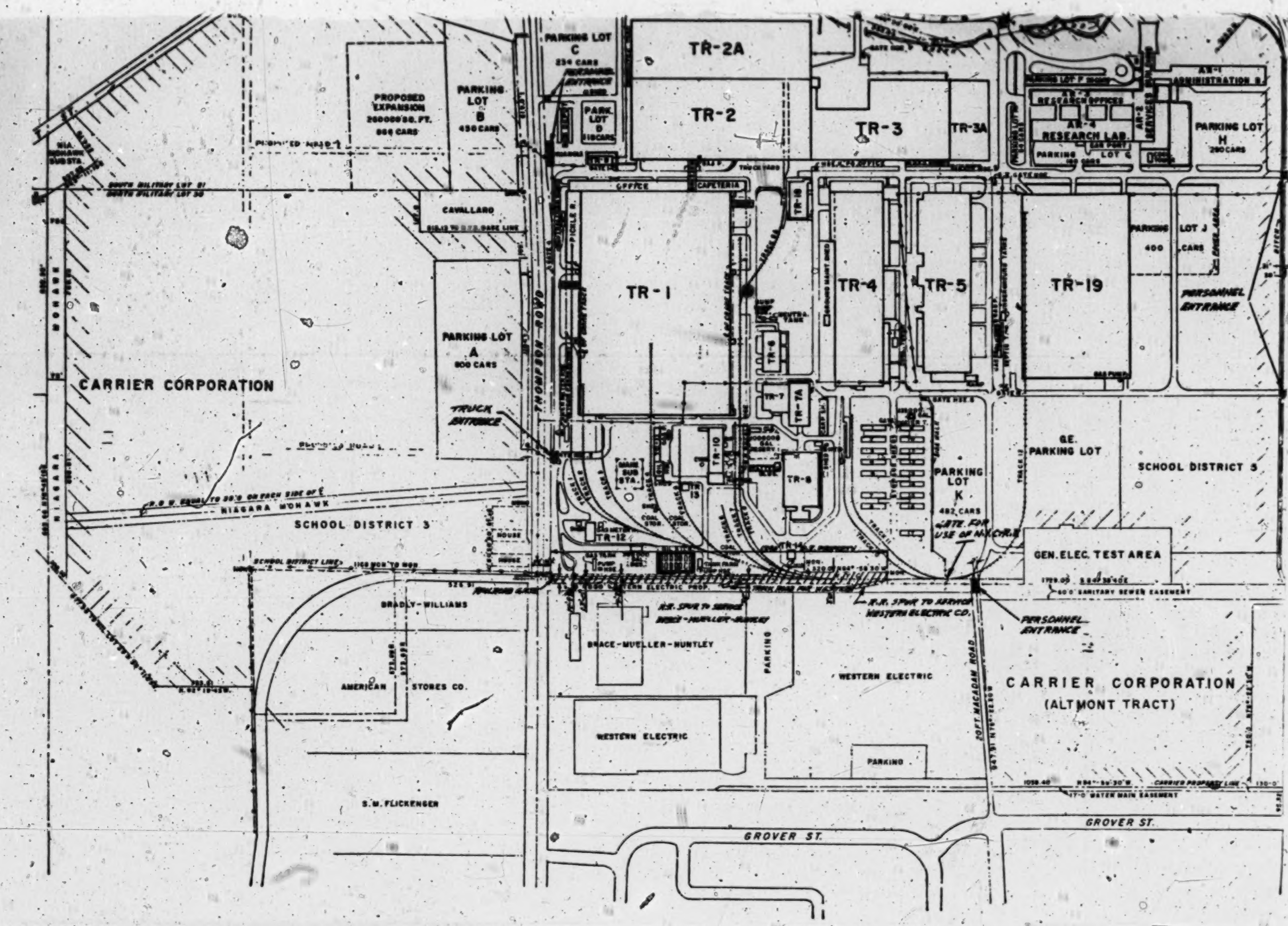
BOUNDARY LINE

EASEMENT LINE

FENCE LINE

SCHOOL DISTRICT LINE

PROPOSED ROADS



PEM-TR-3322 CARRIER THOMPSON ROAD PLANT

ME-TR-1990 PROPERTY OF CARRIER CORP. NORTH OF TR-1

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LEGEND

SPRINKLER TRAFFIC LIGHT

BOUNDARY LINE

EASEMENT LINE

FENCE LINE

SCHOOL DISTRICT LINE

PROPOSED ROADS

PROPERTY OF CARRIER CORPORATION

PROPERTY OF CARRIER FOUNDATION

PROPERTY PRESENTLY OCCUPIED BY GENERAL ELECTRIC

CARRIER CORP. PERSONNEL ENTRANCE

CARRIER CORP. TRUCK ENTRANCE

NEW HIGH CONTROL R.R. PROPERTY

11 APPROV. EASEMENT AT CARRIER FOUND. N.Y. 1-15-50

10 MAP REDRAWN N.Y. 1-12-50

100' SCALE

CARRIER CORP. SYRACUSE, N.Y.

SYRACUSE, N.Y.

PLAT PLAN OF CARRIER CORPORATION

MFG. FACILITIES ADJACENT HOLDINGS & PROP.

K. NICK

DWG NO. PEM-TR-1936

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11. The foregoing account of the incident at the railroad gate on March 11 represents a composite of the credited testimony of Train Master Bowes, Deputy Sheriff Tedesco, Guard Captain Wood, and Employees Gordon Dinger and Hugh Lincoln. Dominic Albanese, the captain of the pickets on the day in question, and whose testimony I do not otherwise credit (*infra*, p. 15) substantiated generally the account of the train obstruction. Nor does anything in the testimony of either Kowalski or Brewster, neither of whom I credit (*infra*, fn. 17 and 19), dispute the finding I have made concerning this incident.

the individuals employed by the New York Central, an employer engaged in commerce, to refuse in the course of their employment to transport or otherwise handle Carrier goods, articles, materials, or commodities, or to perform services for their employer, the New York Central. It is equally clear from the foregoing facts that these same Respondents have thereby threatened, coerced and restrained the New York Central to the extent described by the facts found above.

Extended argument is unnecessary to demonstrate that the calling of invective and threats, as did the pickets here, the blocking of the train's passage by massing of pickets before it, and the blocking of the right-of-way with an automobile, singly and collectively, most certainly had a restraining and coercive effect upon the employees and individuals employed, not by Carrier, but by the secondary employer, the New York Central. This the Act proscribes.¹² Nor do I have any alternative but to conclude that Respondents, and each of them, by the conduct found and described above, had as their objective the forcing and requiring of New York Central to cease handling, transporting, and doing business with Carrier. In support of such a conclusion I need only rely upon the actions and words of the pickets themselves as described by credible testimony at the hearing. Thus it is clear that so long as the train's movements

12. In language equally applicable to the facts herein, the U. S. Court of Appeals for the Ninth Circuit stated in *Great Northern Railway Company v. N. L. R. B.*, 272 F. 2d 741, 743:

The only purpose of the pickets on the spur track of the railroad was to involve the railroad in the union's dispute with Foley (the primary employer). Such picketing was therefore not primary in nature but . . . amounted to a secondary boycott, proscribed by Section 8(b)(4)(A) of the Act.

and switching was confined to servicing plants other than Carrier, no action or objection was mounted by the pickets. However, any movement directed to Carrier pickups or deliveries met with immediate reaction. Indeed, Dominic Albanese, captain of the pickets at the railroad gate during the March 11 incident, described the arrival of the train on the scene as follows:

[Train Master Bowes] asked me if I was going to let the train through and I says "I have no objections as long as you are going in there to move Brace, Mueller and Huntley and G. E. material in and out of there." And I asked him for his way-bills, and he says "We don't have any." "Well," I says, "When, since when does a yard engine come in without waybills? You have had them in the past." He says "We don't have any." He says "I don't have to show them to you."

I says "Well, maybe you don't have to, but I would like to see them. After all, this plant is on strike. There is a picket line here. We would like to have you respect the picket line." Tr. 457-458.

Upon such an admission by an active participant of the train obstruction, the objective of the pickets is manifest. It was to force or require New York Central to cease handling or transporting Carrier products and otherwise doing business with it. Accordingly, I conclude and find that by the conduct described above with the objective I deem to have been fully established, Respondents, and each of them, have violated Section 8(b)(4)(i)(B) and 8(b)(4)(ii)(B) of the Act.

C. RESTRAINT AND COERCION OF CARRIER EMPLOYEES

The foregoing findings and conclusions have been segregated from other alleged violations arising out of the Carrier strike for the obvious reason that, unlike those which

follow, they involved another employer, the New York Central, and have previously been the subject of an injunction proceedings held under Section 10(1) of the Act. Thus the findings constitute a violation separate and distinct from any found hereafter. That is not to say, however, that the incidents involving *Carrier* employees and to be described, are differently motivated or otherwise disconnected from the railroad track incident of March 11. They are not, and their separate treatment at this point is not to be so construed.

1. *Restraint and coercion of photographers*

Throughout the strike *Carrier*, as previously noted, assigned numerous employees to take pictures of strike and picketing activity. Among these were Employees Gordon Dinger and John Diehl, both of whom testified credibly at the hearing. Among their assignments was the photographing of events attendant upon the train movement on the afternoon of March 11, as described above.

As Diehl was taking pictures of the train coming through the massed pickets, Louis Hosid and Leslie Carver, two of the pickets, forced Diehl off the snowbank from which he was taking pictures and, with a number of other pickets, grouped themselves around him. Diehl thus described the incident:

Well, I was taking pictures of the train coming through and the pickets and the tracks and the men opening and closing the gates, and the disturbance going on and he (John Diehl) turned around and recognized me. He was with Les Carver at the time, and they forced me off the snowbank that I was on and about 15 of them grouped around me, and Louis Hosid told me if I showed any of those blankety-blank pictures to any *Carrier* employees or officers, that he would get me later, it wasn't over yet, he would find

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out where I lived and they were all calling me names and hollering at me, and as they were surrounding me there in front of the Sheriff's car, one of the sheriffs came over and wanted to know what the disturbance was and Mr. Hosid told the sheriff that I was out taking pictures, and he didn't want his picture taken, and I should be inside the gate with the rest of the employees. (Tr. 274)

Gordon Dinger was also assigned to photographic duty at the train gate on March 11, and appeared on the scene before the train arrived and while the gate was still locked. He took pictures of the pickets from within the fence enclosure and several times during the afternoon went out onto Thompson Road to take movies of the events transpiring there. During the course of his work, Louis Hosid, the picket referred to earlier, invited him off the premises and threatened to beat him up. Again, sometime between 12:30 and 2 p.m., Hosid rushed up to Dinger who was then standing behind the fence, and wielded a hand file at him in a threatening fashion, while others, identified by Dinger as pickets, threw chunks of ice at him and another cameraman.

—Upon the foregoing credited evidence I conclude and find that on March 11, as an incident to the obstruction of the passage of the New York Central train, as previously found, Respondents' pickets, in the presence of responsible officers and agents of Respondent, namely, Brewster and Picket Captain Albanese, restrained and coerced Employees Dinger and Diehl by threats of, and in the case of the thrown ice, by the use of physical force.¹³

13. Respondent Brewster's presence at the train gate or about 2 p.m. on March 11 is established by the credible testimony of Dinger who testified that the file incident occurred then, and of Employee Lincoln who fixed

Citation of authority is unnecessary to establish that such conduct as found above constitutes a violation of Section 8(b)(1)(A) of the Act.

In addition to the foregoing evidence relating to threats made to employee photographers there is further evidence of similar threats made by other pickets and officials of the Respondent, based upon amendments made to the complaint at the opening of the hearing, over Respondent's objection.¹⁴ Thus, John Diehl testified that Dominic Albanese, the picket captain, also threatened him, as had Louis Hosid (*supra*, p. 8), telling him "to get out of there with that blankety-blank camera, or he would get me." Similarly, Employee Dinger placed Picket Kenneth Lyon and Respondent Francis Brewster at the train gate on

Brewster's presence there at that time. Brewster, while denying the conduct attributed to him, concedes he was present at the time Dinger fixed the incident, 2 p.m. I do not credit Brewster's denial nor do I credit Carver's denial of his part in the threat made to Employee Diehl.

14. While I am firmly of the belief that preparation for hearing and perfection of pleadings should precede the hearing and not be part of it and I am disposed to insure opposing counsel ample time and opportunity to meet matters belatedly added, I do not believe that Respondent has suffered here. Although the additions were not incorporated into the pleadings until the opening of the hearing, their substance was conveyed to Respondent's counsel 5 days earlier on Thursday, May 5. While orderly procedure would suggest that such amendments should have been actually made on that date, it cannot reasonably be said that Respondent, with associated counsel located in Syracuse, was surprised by these additionally alleged incidents of previously alleged violations. I accordingly reaffirm my rulings at the hearing granting the amendments, and rejecting counsel's objection that he was afforded inadequate opportunity to prepare for the defense of the added materials.

March 11 and credibly quoted both Lyons and Brewster as inviting him outside the gate and they would beat him up or "fix him" and take his camera away from him.¹⁵ Thereafter Dinger, on April 4 and 5, had further difficulties with the pickets. On this occasion, while indulging in picture taking at the main gate of the plant, Picket David Halstead asked him to step across the line with the camera and threatened, in effect, to beat him up.¹⁶

Upon the foregoing additional evidence I find that pickets and officials of the Respondents have further restrained and coerced the photographers and thereby have further violated in this respect Section 8(h)(1)(A) of the Act.

Additionally General Counsel sought to elicit testimony at the hearing that one Hunkins, a picket, threatened Dinger. Because Dinger was unable to specify with any degree of certainty when during the week of April 11 this threat was made, thus depriving Respondents of full opportunity to meet the issue and defend themselves in this respect, I recommend that so much of the amended complaint as relates to conduct thus attributed to Hunkins be dismissed. Likewise, as nothing appears in the record relating to a picket Talbot having threatened any photographer I recommend that so much of the amendments to the complaint as related to conduct attributed to Talbot

15. I do not credit the denials of either Brewster or Lyons of the conduct attributed to them.

16. Halstead testified that Dinger took pictures of him and did so in an offensive manner, holding the camera within a couple of feet of his face. As Halstead also testified that the process was annoying to him his normal reaction would seem to be to make the statement attributed to him, and I find that he did. Therefore, without accepting his evaluation of Dinger's technique, I reject Halstead's denial.

be dismissed. Similarly, Picket Roy Avery was alleged to have threatened certain Carrier employees engaged in taking photographs. The only individual who testified to such threats by Avery was Daniel Owen, a commercial photographer hired by Carrier to take photographs. By his own testimony Owen was an independent contractor and not a Carrier employee. As the allegations do not encompass nonemployees of Carrier in this respect (par. 13(a)) I accordingly dismiss so much of the complaint as relates to Roy Avery.

2. *Alleged threats of bodily harm to employees for failing to observe picket line*

In the original complaint (par. 13(b)) it is alleged that Respondents threatened to inflict injury on various employees including Carrier's, if they refused or failed to observe the picket line. Pickets Carver and Calland were alleged to have made such threats on April 5, and Hosid to have made them on March 11. A careful review of all the testimony, including that of Train Master Bowes, Guard Captain Wood and Employee Dinger discloses no evidence that either Hosid or Calland made threats *for such a purpose* on the date alleged or on any other date. There is, however, the credited testimony of Captain Wood that he heard Picket Leslie Carver talking to Employee James Dirk, a fire inspector at work in the plant during the strike. Carver told Dirk that "we are going to visit Bridgeport (N. Y., and Dirk's home), and we will take care of you and your gas station." As the record is otherwise silent as to the background for Carver's threat to Dirk I have no more basis for assuming that it was related to nonobservance of the picket line than I have for assuming it to be in settlement of some extracurricular grudge.

In addition to the incidents considered above other al-

leged incidents were added to Paragraph 13(b) of the complaint at the hearing, (see fn. 14 *supra*). Thus it is alleged that Picket Kenneth Lyon, on March 11, threatened bodily injury if the picket line was not observed. The only possible support for this allegation appears in Employee Gordon Dinger's testimony that Lyon was among those at the railroad gate shouting threats at employees and guards inside the fence, and that he threatened dire consequences to Dinger if he came out. It was similarly alleged that on the same date Picket Captain Albanese and Respondent Kowalski threatened bodily injury for nonobservance of the picket line; but here again, upon the credited testimony of Guard Captain Wood, the threats were shown to have been connected with the passage of the train into the Carrier plant (*supra*, pp. 5-6) and in the case of Kowalski, his statement to Wood that because of the train movement the Union was not going to allow any more salaried employees in or out of the plant. He did not however, include in this pronouncement any threat of bodily injury to any employee. Thus it would appear that if there has been any threat made at all, it would be the threat to Dinger as to what would happen to him if he came out of the plant. Dinger, it will be recalled was taking photographs on a special assignment and it is to be presumed that the complaint with Dinger was not his nonobservance of the picket line but his photographic activities.

All of the foregoing relates to activity by employees other than crossing the picket line and entering the plant, the substance of the allegation. While I am not so naive as to believe that in the course of a heated labor dispute threats are not usually made to nonstrikers as to what will happen to them, physically, if they do cross the picket line and enter the plant, I certainly am not about to substitute a surmise in this respect for legal evidence. A review of the

credible testimony in this record discloses no evidence that on or about the dates set opposite their names the pickets referred to in paragraph 13(b) of the complaint threatened "to inflict bodily injury or to cause other harm to various employees, including certain Carrier's employees, if these employees refused or failed to observe the picket line established by the Respondents." Accordingly, I shall recommend that this paragraph of the complaint be dismissed.

3. *Obstructing ingress or egress of employees at plant entrances*

On March 11, Respondents Brewster and Kowalski actively participated in the picketing at plant entrances as well as at the previously described railroad right-of-way (*supra*, pp. 5-6). Thus as Employee Joseph Puchalski attempted to drive his car through the main entrance of the plant Brewster and several other pickets including Jay Sherman, Chairman of the Grievance Committee, approached his car and stood in front of it and to the side, with someone shouting "you can't go in there." When Puchalski realized that he was being prevented from entering the plant he backed his car away, with Brewster's guidance, and left the gate, seeking out a company monitor to whom he reported the incident. During the course of his testimony Respondent Brewster sought to explain the Union's general conduct of requiring salaried nonstriking workers to show special badges or passes. Thus he stated that he suggested to management that better identification be given these people to insure to the Union that strike-breakers were not being brought in. Absent such company cooperation Brewster conceded that he informed management that "we will stop every car by walking slow, and until you identify these people and they identify themselves" (Tr. 511). I do not, however, credit Brewster's

affirmative testimony in answer to his counsel's leading question that the further purpose of stopping entrants was to "ask those people who would be in the bargaining unit to respect [the] picket line."¹⁷

On the evening of March 11, following the railroad incident, Guard Captain Wood reported an incident involving the departure of a supervisory employee, Simmons, who was driving a number of salaried employees out of the plant. Earlier in the day the employees had been engaged in preparing the disputed railway cars for shipment (*supra*, p. 5). Wood's account was as follows:

Mr. Kowalski came on the property and started to object to the driver of the car and I immediately proceeded to the vicinity of the car and Mr. Simmons got out of the car and Mr. Kowalski stated he was going to inspect the trunk of the car. I told him he was on company property, he would have to remove himself from company property. This he refused to do until he looked in the back trunk of the car.

Mr. Simmons looked at me. I told him he did not have to under any circumstances open his car for inspection by any person, and Mr. Kowalski stated he wasn't

17. Brewster, by thus contradicting himself, convinces me of his unreliability as a witness. First he testifies that he was stopping cars to see if the occupants really were salaried workers and not strikebreakers. Then he states that he was stopping cars to persuade people in the bargaining unit, i. e., nonstrikers, not to observe the picket line. Because Brewster's handling of this matter and other items (such as his equivocal explanation of his absence from the picketed area at one time due to hospitalization at another time) I do not credit Brewster's testimony generally except insofar as it would constitute an admission against the interest of any one or more Respondents, or is otherwise corroborated by the testimony of credited witnesses.

going to get off the property until he did open the trunk of his car.

I called for a Deputy Sheriff, and the Deputy Sheriff one came across the road and as he came across the road, Mr. Simmons opened the trunk of the car and Mr. Kowalski took one quick look and got off back to the picket line, off the carrier property.

During the course of the discussion, Mr. Kowalski told me that they were not going to allow any more salaried employees in or out-out, but not in, of Carrier Corporation because of the dirty trick that was pulled by taking the train out . . . (Tr. 248-249)¹⁸

Kowalski admitted to this conduct, explaining, as he had to Wood at the time, that "the pickets here are a little bit concerned about some stuff that is being hauled out of here by cars, and we are asking you to open your trunk." (Tr. 536)¹⁹

Previously, on March 7, Kowalski was at the picket line at the main gate as Fred Chamberlin, a salaried employee, sought to go to work. He was stopped by pickets who objected because he carried a temporary badge. He asked

18. This item was referred to perviously herein at p. 5.

19. Except insofar as Kowalski's testimony constitutes an admission against the interest of any one or more of the Respondents or is corroborated by the testimony of credited witnesses, I do not consider his testimony reliable and do not credit it. Illustrative of such unreliability is the conflict created by his explanation of the trunk incident. Captain Wood reliably testified it occurred on the evening of March 11, following the train incident, and involved employees who had been engaged in the train handling. Kowalski admitted to the incident, explained his reason for requiring a search of cars, but elsewhere in his testimony stated that on the conclusion of the train incident he had actually left the area and did not return that day.

to see whomever was in charge and was referred to Kowalski to who he explained the nature of his badge and the fact that he had been employed for a month as an engineer and wanted to go to work. Kowalski refused to permit Chamberlin to pass and the latter, considering a further attempt "foolish," left the area.²⁰

Upon the following credited evidence I conclude and find that on March 7, Respondent Kowalski, and on March 11, Respondents Kowalski and Brewster restrained and coerced Employees Puchalski and Chamberlin, and the employees riding in Supervisory Employee Simmons' car, by obstructing, blocking, and preventing their ingress or egress, as the case may have been, at entrances to the Carrier plant. Such conduct clearly constitutes a violation of Section 8(b)(1)(A) of the Act.

In the complaint it was originally alleged as part of Paragraph 13(c) that David Halstead and Jay Sherman obstructed ingress and egress to the plant on March 7, and that Frank Stirpe did likewise on March 11. I find nothing in the record to so implicate either Halstead or Stirpe at the time stated,²¹ and insofar as Sherman is concerned I find that the only time he was so engaged was on March 11, as noted earlier, but not on March 7. Accordingly, I shall recommend that so much of Paragraph 13(c) as refers to these three individuals be dismissed.

In addition to the incidents alleged above other allegations were added to Paragraph 13(c) at the hearing (See fn. 14, *supra*). Thus Employee Puchalski credibly testified that on March 3, Picket Lyon required him to show his

20. Kowalski did not deny this conduct attributed to him by Chamberlin.

21. This incident is not to be confused with Halstead's encounter with Photographer Dinger, *supra* p. 10.

badge before passing through the plant gate.²² Similarly Arthur Calland, a picket on duty at the main gate on March 4, stopped a salaried employee because he had a temporary badge, and in agreeing to allow this employee to enter, stated that as of the following Monday they were not going to have any temporary badges.²³

Upon the foregoing additional evidence I find that pickets on the picket line maintained under Respondent's direction and supervision further restrained and coerced Carrier employees by obstructing, blocking and preventing their ingress and egress at entrances of the Carrier plant and thereby further violated in this respect Section 8(b)(1)(A) of the Act. In so finding, however, I do not consider Picket Larry Roach's actions of patrolling his picket assignment at a slow pace, in front of cars and pedestrians entering the plant gate on April 4, to have been so motivated or executed as to constitute restraint or coercion of employees. Accordingly, so much of the amendment to Paragraph 13(e) of the complaint as refers to Larry Roach I shall recommend be dismissed.

4. *Obstructing ingress and egress of employees of the New York Central at its right-of-way*

As detailed previously (*supra*, pp. 5-6) Respondents Kowalski and Brewster, as well as other officials and members of the Respondent labor organizations were instrumental in obstructing the passage of the train on March 11. In the process of this picketing activity it is clear from

22. I do not credit Lyon's denial of this incident.

23. The credited testimony of Guard Captain Wood. Calland admits the substance of the incident; differing only as to its purpose. I do not credit his testimony that he was merely suggesting that nonstriking employees "observe our picket line, please don't go in."

credited testimony in the record that those in charge of the train movement were at constant odds with the pickets. Thus Picket Paul King fell down on the tracks and had to be forcibly removed;²⁴ Kowalski parked his car on the tracks; Brewster was among the mass of pickets refusing to move from in front of the train, and was heard to shout, "we will take care of you guys when you come out, you scabs";²⁵ Louis Hosid invited Train Master Bowes to get off the engine and he would "knock my block off,"²⁶ and Jay Sherman, Chairman of the Local's Grievance Committee, was in the forefront of the blocking group that shouted, "let's not let them enter."²⁷

All of these incidents, and indeed the entire train incident, took place, it will be recalled, in the presence of Carrier employees acting as photographers and monitors, together with those who were mere bystanders, some of whom were themselves the object of the pickets' coercive conduct (*supra*, pp. 8-11). In view of the presence of these Carrier employees when train personnel were thus obstructed, as described, it requires no extended explanation to demonstrate the effect such action might be expected to have upon Carrier employees. For if the pickets were thus disposed to engage in what constituted restraint and coercion of the railroad personnel it would certainly take a very obtuse Carrier employee not to see that he would be next. I therefore find and conclude that by obstructing the ingress and egress of New York Central personnel, thereby restraining and coercing them, the Respondents and their pickets thereby effectively coerced and restrained the Carrier employees

24. The credited testimony of Deputy Sheriff Tedesco.

25. The credited testimony of Guard Captain Wood.

26. The credited testimony of Bowes.

27. The credited testimony of Employees Lincoln and Dinger.

who were present. Such restraint and coercion I find to violate Section 8(b)(1)(A) of the Act.

5. *The assault upon peace officers*

At the commencement of the hearing it was alleged over Respondent's objection (see fn. 14, *supra*) that Respondent further restrained and coerced Carrier employees by the assaults and inflictions of personal injury and the harm upon various individuals, in the presence of Carrier employees.

In this respect the evidence discloses, upon the credited testimony of Deputy Sheriff Tedesco, that on March 11, as the train was making one of its passages onto Thompson Road, Roger Potter was among the milling pickets previously described (*supra*, pp. 5-6) and like Paul King (*supra*), had to be forcibly picked up and removed from the train's path.²⁸ Potter rose from the ground swinging his fists, one of the blows landing on Deputy Tedesco as Tedesco was placing Potter under arrest.²⁹

Thereafter, on April 4, as pickets were walking in front of the main plant gate Deputy Sheriff Nash was set upon by Harland Wallace, one of the pickets, knocked to the ground, punched, and in the process was gouged in the eye.

Harland Wallace did not testify at the hearing, but Anthony Albanese, a picket, testified that at the time in question Wallace was being dragged across Thompson

28. There is conflict as to whether he fell or was pushed. There is no dispute that he had to be forcibly removed; and that is the critical fact.

29. While Tedesco suggested that this blow might have been accidental, there is no evidence that the Carrier employees witnessing it from the area inside the train gate made the same charitable appraisal of Potter's reflexes.

Road from the main gate by Deputies other than Nash, and thereafter was beaten by seven or eight Deputies. Albanese further testified that at this very time Deputy Nash was on the west side of the street making an arrest. He then came back "from the arrest he made, and he got in the whole business." On cross-examination, however, Albanese testified he did not see Nash and Wallace together, and when asked if there was any encounter between the two he stated that he did not "see how it could have possibly taken place." By thus placing Nash "in the whole business" and not seeing how an encounter involving Nash "could have possibly taken place" Albanese has so contradicted himself as to make his account of the incident worthless. I therefore credit Nash's otherwise undisputed testimony that he was beaten by Harland.³⁰

And finally on April 5, pickets, including Respondents Brewster and Kowalski, and the Local's Grievance Committee Chairman Jay Sherman, were walking in front of the main gate of the plant. On this occasion Employee Hugh Lincoln observed a picket, whom he identified as Arthur Calland, spit at and kicked a deputy sheriff.³¹

30. The extent of Nash's injuries are not clear. Thus, in gory fashion, Nash describes his eyeball hanging out as a result of the gouging. Without engaging in a clinical discussion of the subject it is sufficient to find and conclude as I do that Nash was beaten and that Harland was responsible for it. How bad a beating it was has no relevance to the issue presented here. Suffice it to say he appears fully recovered.

31. As in the case of his previously considered testimony, I do not credit Calland in his denial of this conduct or in his testimony that one of his strike duties was to keep peace on the picket line. Neither do I credit, for reasons previously stated, the explanation of Respondent Brewster of his actions from the scene of the assault, or Respondent Kowalski's lack of recollection of its occurrence.

On each of the occasions noted above, employees of Carrier were shown to have been present, thus observing Deputy Tedesco being struck, an unidentified deputy being kicked and spit upon, and Deputy Nash being beaten, all during the act of picketing and in the presence of officials, including Respondents Brewster and Kowalski.

The reasonable conclusion to be drawn by Carrier employees witnessing such conduct would be that the pickets were determined to strike out at anyone, be they employees or constituted authority, who would thwart their picket activity. Such conduct most certainly was calculated to having a restraining and coercive effect upon those, who observed it and I so find.

Nor am I constrained to minimize the actions because Potter's punch was accidental, or Calland's spittal or kick fell short of the mark, or because Nash was not hospitalized and did not actually lose the sight of an eye. People were assaulted and that should normally be expected to instill the proper fear in those witnessing it. How or how badly they were assaulted is a matter for the police court or for the assessment of damages, not for the determination of unfair labor practices. Accordingly, I find and conclude that by the assaults and infliction of injury on the peace officers, as detailed above, Respondents and each of them restrained and coerced Carrier employees in violation of Section 8(b)(1)(A) of the Act.

V. The effect of the unfair labor practices upon commerce

The activities of the Respondents, set forth in Section IV, above, occurring in connection with the operations of the Company set forth in Section I, above, and with the operations of the New York Central Railroad, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead

to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. The remedy

Having found that Respondents, and each of them, have engaged in and are engaging in unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the above findings of fact and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. The Respondents Local Union No. 5895, United Steelworkers of America, AFL-CIO, and United Steelworkers of America, AFL-CIO, are each labor organizations within the meaning of Section 2(5) of the Act.

2. Respondents have induced and encouraged individuals employed by New York Central Railroad to engage in a refusal in the course of their employment to perform services with an object of forcing or requiring the New York Central Railroad to cease doing business with the Carrier Corporation, and have thereby violated Section 8(b)(4)(i)(B) of the Act.

3. Respondents have threatened, coerced, and restrained the New York Central Railroad with an object of forcing or requiring the New York Central Railroad to cease doing business with the Carrier Corporation, and have thereby violated Section 8(b)(4)(ii)(B) of the Act.

4. By restraining and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondents, and each of them, have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(1) of the Act.

5. The aforesaid unfair labor practices having occurred in connection with Carrier's operations as set forth in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and substantially affect commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I shall recommend that Respondents, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Inducing and encouraging any individual employed by New York Central Railroad to engage in a refusal, in the course of his employment, to use, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require the New York Central Railroad to cease doing business with Carrier Corporation;

(b) Threatening, coercing, or restraining the New York Central Railroad, where an object thereof is to force or require the New York Central Railroad to cease doing business with Carrier Corporation;

(c) Restraining or coercing employees of Carrier Corporation in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Post in conspicuous places at their offices in Syracuse, New York, copies of the notice attached hereto as an Appendix. Copies of said notice to be furnished by the Regional Director of the Third Region, shall, after being duly signed by an authorized representative of the Respondent labor organizations,

and by the respective individual Respondents, be posted immediately upon receipt thereof and maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondents to insure that the notices are not altered, defaced, or covered by any other material:

(b) Sign and mail sufficient copies of said notice to the Regional Director, Third Region for posting, Carrier Corporation and the New York Central Railroad Company willing, at all locations where notices to their respective employees and individuals employed by them are customarily posted;

(c) Notify the Regional Director for the Third Region in writing within twenty (20) days from the receipt of this Intermediate Report what steps Respondents have taken to comply herewith.

It is recommended that unless Respondents shall within twenty (20) days from the date of the receipt of this Intermediate Report, notify the Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring Respondents to take the action aforesaid.

It is further recommended that insofar as the complaint and the amended complaint allege the commission of unfair labor practices as set forth in paragraph 13(b), in paragraph 13(a) with respect to conduct of Roy Avery, Irving Talbot, and John Hunkins, and in paragraph 13(c) with respect to conduct of David Halstead, Larry Roach, Jay Sherman, and Frank Stirpe, it shall in those limited respects be dismissed.

Dated at Washington, D.C., September 29, 1960.

/s/ THOMAS F. MAHER
 Thomas F. Maher
 Trial Examiner

APPENDIX

NOTICE

TO ALL OUR OFFICERS, AGENTS,
REPRESENTATIVES AND MEMBERS

TO ALL EMPLOYEES OF THE NEW YORK
CENTRAL RAILROAD COMPANY

TO ALL EMPLOYEES OF CARRIER
CORPORATION
PURSUANT TO

THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, you are hereby notified that:

WE WILL NOT induce or encourage any individual employed by NEW YORK CENTRAL RAILROAD COMPANY to engage in a refusal, in the course of his employment, to use, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require the NEW YORK CENTRAL RAILROAD to cease doing business with CARRIER CORPORATION.

WE WILL NOT threaten, coerce or restrain NEW YORK CENTRAL RAILROAD COMPANY with the object of forcing or requiring it to cease doing business with CARRIER CORPORATION.

WE WILL NOT restrain or coerce employees of CARRIER CORPORATION in the exercise of rights guaranteed them by the National Labor Relations Act, as amended.

FRANCIS BREWSTER, President
LOCAL UNION 5895

LOCAL UNION No. 5895,
UNITED STEELWORKERS OF
AMERICA, AFL-CIO

By.....
President

Dated.....

JOHN KOWALSKI,
Staff Representative
UNITED STEELWORKERS OF
AMERICA, AFL-CIO

UNITED STEELWORKERS OF
AMERICA, AFL-CIO

By.....

Staff Representative

Dated.....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

RESPONDENT'S TELEGRAM

510P EDT OCT 21 60 SYB268

SSH644 SY BUD296 PD BUFFALO NY 21 445P EDT

JOHN LYNCH

HILLS BLDG SYRACUSE NY

RE CARRIER CORP UNITED STEEL WORKERS
CASE #300106 AND 30049 REQUEST EXTENSION TO
OCTOBER 31ST 1960 TO FILE EXCEPTIONS AND
BRING IN SUPPORT THEREOF TO INTERMEDIATE
REPORT OF TRIAL EXAMINER MAHER IN THE
ABOVE CONSOLIDATED CASES CONSEL FOR RE-
SPONDENT HAS BEEN ENGAGED IN LITIGATION
AND NEGOTIATIONS ON MATTERS IN SYRACUSE
AND BUFFALO CONSEL FOR GENERAL CONSEL
HAS NO OBJECTION CONSEL FOR CHARGING
PARTY OUT OF TOWN AND UNABLE TO BE
REACHED BY HIS OFFICE TELEGRAPHIC COPIES
OF THIS REQUEST BEING SENT

THOMAS P MCMAHON ATT FOR RESPONDENTS
1028 LIBERTY BANK BLDG

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

• • • (Caption—3-CC-106 and 3-CB-439) • • •

**MOTION OF CARRIER CORPORATION
TO ADOPT FINDINGS, CONCLUSIONS
AND RECOMMENDATIONS OF THE
TRIAL EXAMINER**

Comes now CARRIER CORPORATION, charging party in the above-captioned proceeding, by its attorney, and moves that the Board adopt the findings, conclusions, and recommendations of the Trial Examiner and, as reasons therefor, states as follows:

1. On September 29, 1960, Trial Examiner Thomas F. Maher, issued his Intermediate Report and Recommended Order in this proceeding and, on the same date, Howard W. Kleeb, Executive Secretary (Acting), issued an Order Transferring Case To The National Labor Relations Board. Said Order Transferring Case stated:

“Exceptions to the Intermediate Report in this case must be received by the Board in Washington, D. C. on or before October 24, 1960”.

2. Thomas McMahon, counsel for Respondent Unions, telephoned M. Harold Dwyer, Esq., on the afternoon of Friday, October 21, 1960, requesting charging party to consent to a request for an extension of time in which to file exceptions. Said M. Harold Dwyer, as set forth in the affidavit attached hereto and made a part hereof, advised counsel for Respondents that he had no authority to make such an agreement and that counsel for Carrier Corporation was absent from the city and unable to be reached by telephone and that the Vice President and General Counsel of Carrier Corporation was also unavailable. Dur-

ing said telephone conversation counsel for Respondents did not advise said M. Harold Dwyer as to whether or not he had filed with the Board a request for extension of time or would file such a request if unable to secure the consent of the charging party.

3. On Saturday, October 22, 1960, a copy of a telegram requesting an extension of time until October 31, 1960, in which to file exceptions to said Intermediate Report, was received at the office of John E. Lynch, Esq., counsel for Carrier Corporation. Said telegram was signed by Thomas P. McMahon as attorney for Respondents and was addressed to the National Labor Relations Board, and had been sent from Buffalo, New York, at 4:45 P.M. on Friday, October 21, 1960. Said telegram was not received in Syracuse until after the close of business on October 21, 1960, and was not received by John E. Lynch himself until early Monday, October 24, 1960. On Monday afternoon, October 24, 1960, said John E. Lynch received a telegram from the National Labor Relations Board signed by Howard W. Kleeb, Associate Executive Secretary, granting such extension of time.

4. As of this date counsel for Respondent Unions has not filed exceptions to the Intermediate Report.

5. Section 102.46, Rules and Regulations of the National Labor Relations Board, Series 8, requires that requests for an extension of time in which to file exceptions must be received by the Board three days prior to the due date. In computing any period of time prescribed by said Rules, Section 102.114(a) provides that the day of the act after which the designated period of time begins to run is not to be included. This section also provides that when the period of time prescribed is less than seven (7) days, as here, intermediate Sundays and a Saturday on which the Board's

offices are not open for business, shall be excluded in the computation.

6. Section 102.114(b) of said Rules requires that any document filed pursuant to the requirements of said Rules must be received by the Board before the close of business of the last day of the time limit.

7. Pursuant to said Rules, time for filing a request for extension of time in which to file exceptions in this proceeding expired at the close of business Wednesday, October 19, 1960, which is three days prior to the date exceptions were due excluding Sunday and a Saturday on which the Board's offices were not open for business. Even though the specific language of such rules were to be disregarded and they were to be construed as not to exclude the Sunday and Saturday in question, the deadline for filing such request occurred no later than the close of business Friday, October 21, 1960.

8. Inasmuch as Respondents request for extension of time was not sent from Buffalo until 4:45 P.M., Friday, October 21, 1960, it is the information and belief of counsel for charging party that said request was not received by the Board in Washington until after the close of business on said date, more than two days after it was due and was, in fact, not received by any responsible official of the Board until sometime Monday, October 24, 1960, and was therefore not timely filed.

9. Section 102.46 of said Rules, by requiring that exceptions and briefs must be filed on the same date by all parties clearly demonstrates the intent of the Board that no party shall receive the advantage of use of his opponent's exceptions or brief in preparing his own case. Furthermore, the requirement that requests for extension of time must be filed three (3) days prior to the due date puts

all parties on notice that a request has been made sufficiently in advance for opposing counsel to avoid premature filing. In this instance, counsel for the charging party was not informed that a request had been filed or would be filed until Saturday, October 22nd, even though counsel for the charging party could have given such information to said M. Harold Dwyer during his telephone conversation on Friday, October 21, 1960. Where, as here, the request is neither timely filed with the Board or opposing counsel notified and the granting of such request is not received until late on the original filing date, a party who mails documents to the Board and serves opposing parties sufficiently in advance for such documents to be timely filed, suffers serious prejudice. The fact that the charging party avoided such prejudice in this case arose out of the fortuitous circumstance of its brief being filed by hand through counsel located in Washington.

10. Brief of counsel for Respondents to the Trial Examiner was also untimely filed in this proceeding and was accepted by the Chief Trial Examiner only after counsel for the General Counsel and for the charging party agreed to waive the late filing. The Board's rules are clear and specific and it is an abuse of the Board's processes and wholly unfair to the other parties to permit counsel for Respondent continually to ignore such rules.

11. Where a request for extension of time is not timely filed any grant of such request is contrary to the Board's rules and is improper. Therefore, exceptions filed after October 24, 1960, in this proceeding are not timely filed.

12. In his request counsel for Respondents gave no explanation of unusual circumstances as to why the request could not have been timely made (*Kiekhoefer Corporation v. NLRB*, 273 F2d 314, CA 7, 45 LRRM 2376).

Wherefore, CARRIER CORPORATION, respectfully requests the Board to adopt the findings, conclusions, and recommendations of the Trial Examiner for the reason that no exceptions were timely filed.

Respectfully submitted,

CARRIER CORPORATION
HANCOCK, DORR, RYAN & SHOVE

By /s/ JOHN E. LYNCH
John E. Lynch, Esq.
Its Attorney

Of Counsel:

Vedder, Price, Kaufman & Kammholz
1511 K Street, N.W.
Washington 5, D.C.

By /s/ KENNETH C. McGUINNESS
Kenneth C. McGuinness, Esq.

DATED: October 27, 1960

AFFIDAVIT OF M. HAROLD DWYER
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

* * * (Caption-3-CC-106 and 3-CB-439) * * *

STATE OF NEW YORK
COUNTY OF ONONDAGA } **SS:**
CITY OF SYRACUSE

M. HAROLD DWYER, being duly sworn deposes and says:

1. I am an attorney at law and a member of the firm of Hancock, Dorr, Ryan & Shove with offices at 806 Hills Building, Syracuse 2, New York.

2. Said firm are the Attorneys for Carrier Corporation in the above entitled cases and my partner, John E. Lynch, Esq., is the member of said firm who has personally handled and conducted such representation in the above cases.

3. Upon return to my office after lunch on the afternoon of Friday, October 21, 1960, I received a telephone call from Buffalo, New York from Thomas McMahon, Esq., the Attorney for the Respondents in the above entitled cases.

4. Mr. McMahon informed me that he had placed a call for Mr. Lynch but upon being informed that Mr. Lynch was out of town had asked for me; that he had been extremely busy with other matters and had not prepared exceptions and a brief in support thereof to the Intermediate Report and Recommended Order of the Trial Examiner in the above-entitled cases; that he would not be able to prepare and file such exceptions and brief with the National Labor Relations Board on October 24, 1960 which was the last day for such filing and therefore he was

requesting deponent's firm, as attorneys for the charging party in the above cases to consent to an extension to October 31, 1960 of the time for receipt of Mr. McMahon's exceptions and brief.

5. I informed Mr. McMahon that in view of the fact that the matter was being handled by Mr. Lynch, I would not have authority to grant any extension; that Mr. Lynch was either in Pennsylvania or en route home from Pennsylvania and that I would try to reach him by telephone but that I was quite certain that Mr. Lynch also would be without authority to grant any extension without the consent of an officer of Carrier Corporation; that if I was unable to reach Mr. Lynch by telephone, I would attempt to talk with Mr. David W. Jasper, Vice President and General Counsel of Carrier Corporation for authority in the matter; and that I would call Mr. McMahon later in the afternoon.

6. I was unable to reach Mr. Lynch by telephone and upon attempting to reach Mr. Jasper by telephone I learned that he, too, was out of town and could not be reached by telephone.

7. Thereupon and at approximately 4:15 p.m., E.D.T., I telephoned Mr. McMahon at his offices in Buffalo and informed him that I had been unable to reach either Mr. Lynch or Mr. Jasper and under the circumstances could not grant his request for an extension of time to file exceptions and a brief in the above cases. Mr. McMahon replied that he understood my position and stated that he would see what else he could work out.

8. In neither of my said telephone conversations with Mr. McMahon on Friday, October 21, 1960 did he inform me that he had filed a request with the National Labor Relations Board for such extension. Neither did he advise

me after I declined to consent to such extension that he intended to file such a request or that he intended to send a telegram containing such a request.

9. I was present at my said law offices during the morning of Saturday, October 22, 1960 but Mr. John E. Lynch was not present at said office during said morning. At approximately 11:30 o'clock on that morning a telegram addressed to Mr. Lynch was delivered to the offices. I attempted to reach Mr. Lynch by telephone but was unsuccessful.

10. On Monday morning, October 24, 1960, Mr. Lynch received said telegram which is as follows:

"510P EDT Oct. 21 60 SYB263
SSH644 SY BUD296 PD BUFFALO NY 21 445P EDT
John Lynch
Hills Bldg Syracuse NY

RE CARRIER CORP UNITED STEEL WORKERS
CASE #3CC106 and 3CB49 REQUEST EXTENSION
TO OCTOBER 31st 1960 TO FILE EXCEPTIONS
AND BRING IN SUPPORT THEREOF TO INTER-
MEDIATE REPORT OF TRIAL EXAMINER
MAHER IN THE ABOVE CONSOLIDATED
CASES COUNSEL FOR RESPONDENT HAS
BEEN ENGAGED IN LITIGATION AND NEGOTIATIONS ON MATTERS IN SYRACUSE AND
BUFFALO COUNSEL FOR GENERAL COUNSEL
HAS NO OBJECTION COUNSEL FOR CHARGING
PARTY OUT OF TOWN AND UNABLE TO BE
REACHED BY HIS OFFICE TELEGRAPHIC
COPIES OF THIS REQUEST BEING SENT
THOMAS P. McMAHON ATTY FOR RESPOND-
ENTS 1028 LIBERTY BANK BLDG."

11. On Monday, October 24, 1960, I went to lunch with Mr. John E. Lynch and upon our return to the office at approximately 2 p.m., Mr. Lynch was advised that the

Western Union Telegraph Company at 1:35 p.m. had telephoned the following telegram to him:

"Monday, October 24, 1960
1:35 P.M.

JOHN E. LYNCH
c/o HANCOCK, DORR, RYAN & SHOVE
From: WASHINGTON

RE: CARRIER CORPORATION
3-CC-106, 3-CB-439

DATE FOR RECEIPT OF EXCEPTIONS AND BRIEFS IN WASHINGTON IS EXTENDED TO OCTOBER 31, 1960.

Howard W. Kleeb
Assoc. Exec. Secy.

CR 41561 Ext. 7
Copy will be mailed."

12. That neither deponent nor John E. Lynch has had any communication from either Mr. McMahon or the Board in connection with the extension of time to file exceptions and briefs in the above cases except as hereinabove stated.

/s/ M. HAROLD DWYER
M. Harold Dwyer

Subscribed and sworn to before
me this 26th day of October, 1960.

/s/ ROBERT A. SMALL
Robert A. Small
Notary Public
Onon. Co. No. 34-3711165
Comm. Expires 3/30/61

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

• • • (Caption—3-CC-106 and 3-CB-439) • • •

STATEMENT OF RESPONDENT
IN OPPOSITION TO CHARGING PARTIES
MOTION TO SET ASIDE THE GRANT
OF ONE WEEK'S EXTENSION OF
TIME IN WHICH TO FIND EXCEPTIONS
AND BRIEF TO TERMINATE REPORT

1. On Friday, October 21, 1960, your deponent, being pressed for time for reasons hereinafter to be stated, called counsel for the General Counsel in the matter to determine if he had any objection to a one week extension of time. Counsel for the General Counsel had no objection.

2. Your deponent sought to contact Mr. Lynch, counsel for the charging party by long distance telephone and was advised that his office expected to hear from him. Your deponent asked if Mr. Dwyer, his associate would call. Mr. Dwyer did respond and advised that Mr. Lynch was out of town, but that the office was expecting a call from him and that he would make an effort to reach Mr. Lynch. Mr. Dwyer called later in the afternoon to say that he could not reach either Mr. Lynch or Mr. Jasper and that he, Mr. Dwyer, had no authority in the case and that Mr. Lynch would not be in a position to act without contacting Mr. Jasper.

Your deponent then put in a call to Mr. McGuinness, and though Mr. McGuinness was busy, your deponent was informed that he would return the call.

Mr. McGuinness did not respond until late in the after-

noon. Mr. McGuiness stated that he was very sorry but he was only "of counsel" and that he had no authority.

Neither Mr. McGuiness nor Mr. Dwyer gave any indication that they had any objection to the request.

Your deponent spoke on two occasions with the acting Executive Secretary, Mr. Kleeb.

Mr. Kleeb gave no indication that a request received October 21, 1960 was outside the three day rule. Indeed, there seemed to be no question but that a request received on October 21, 1960 was timely.

Mr. Kleeb stated that these requests for such a short duration were usually granted as of course, and that I didn't need the consent of other counsel. He suggested that I send off the telegram as promptly as possible.

Your deponent stated, if necessary he would work over the weekend and fly to Washington with the exceptions, but that he would not have an opportunity to submit a brief.

Mr. Kleeb stated that while he didn't have the final authority, his experience was that requests for such a short extension were granted of course.

3. Your deponent again talked with Mr. Kleeb at the close of business on Friday, October 21, 1960 and the substance of the conversation was again repeated. Again, there was no indication that a request received on October 21, 1960 was not three (3) days prior to October 24, 1960.

4. Counsel for charging party states that respondents brief to the Trial Examiner was untimely filed. As to that, whether timely or not, we made it perfectly clear that it was entirely up to the Trial Examiner and if he didn't need the aide of our brief, it was perfectly alright with us.

But on the matter of extensions of time, the charging party was granted, without the consent or even the cour-

tesy of a call, an extension of one month over and above the allotted time to file his brief with the Trial Examiner.

In view of the fact that a State Court injunctive order was in existence, and a Federal Court injunctive order was in existence, and that this extension was granted with the consent of the office of the General Counsel, who had represented to the District Court Judge that in view of the Board's expedited procedures, the issuance of a temporary injunction could not prejudice respondents, it is abundantly clear that it is the charging party who has been granted the decisive benefits in this dispute arising out of extensions of time, as well as every other consideration.

These are the same charging parties who petitioned for an election in May of 1959 and after entering into a consent election agreement, then adopted such procedures as refusing to permit the Regional Director to use company premises to conduct an election and thus was able to postpone the election until January, 1960.

This charging party has, on ordinary equitable principles, no standing to raise the objection of timeliness.

It comes with ill grace from Messrs. McGuinness and Kammholz and other counsel to raise such objections.

5. Charging party cannot, in any way demonstrate any prejudice to it by the granting of the extension.

The granting of the temporary injunctions were dispositive of the issues in the dispute for all practical purposes. By the time the Board treats this case on the merits, regardless of the result, the certification year will have expired. (January 15, 1961)

The charging party is not being put to either expense or harassment or even the exposure to either by the Board's deciding this case on the law and the facts.

6. Counsel for respondents was in Syracuse, New York on September 29th and 30th under an order to Show Cause issued at the behest of the charging party in the State Court injunction action. Your deponent was given until October 3 to get together an affidavit and a memorandum on law in the State Court Action with directions to be in Utica, New York on October 4, later adjourned to October 6, 1960.

The charging party's motion in State Court was to persuade the State Court to enjoin all picketing at what the charging party now termed the General Electric entrance to its plant, on the grounds that it was a "neutral gate" that the picketing at such "neutral gates" "would constitute an unfair labor practice and secondary boycott of General Electric Company by defendants", "Carrier Corporation and General Electric Company have no allied or community of interest except as (lessor-lessee)."

It is all very well for Mr. Kammholz to advise his clients on the use of gambits (see "Kammholz Discusses Gambits in Picketing Cases" 46 IRR 435) but it seems to your deponent that to press such an argument on a State Court Judge was more than a gambit.

The problems involved in the theory of federal preemption are difficult to convey to State Court Judges and particularly in New York State.

Your deponent cannot assert with any degree of certitude whether or not the Order of Transfer and Intermediate Report was received in his office on September 30 or October 1, 1960. Your deponent does assert that he was not even aware of it until October 3 and had no opportunity to read it until October 10, 1960.

But if it was mailed September 29 and received in Buffalo September 30, the charging party by its gambit

deprived counsel for respondents his full twenty (20) days to file exceptions or to request an extension of time.

If the order of transfer and the Intermediate Report were not received until Saturday, October 1, 1960, then Counsel should not be charged with Saturday October 1 and Sunday October 2 in the 20 days which the rules allow.

In addition, your deponent shows that he was engaged in arbitration cases with out of town counsel and days were fixed for the filing of briefs to accommodate such counsel. These cases involved the General Mills plant in Buffalo, New York, and the orderly and prompt disposition of these matters were deemed essential by company and union in order to establish a durable relationship.

Your deponent was engaged in the handling of other litigation pending or threatened, as well as the investigation and preparation of a lengthy position statement to various charges filed against the Buffalo District Council of Carpenters. These charges were of a priority nature and require prompt action.

7. The respondents are entitled to a full review of these issues on the merits.

WHEREFORE, it is respectfully submitted that the motion to adopt the Trial Examiner's rulings and recommendations should be denied.

Respectfully submitted,

McMAHON & CROTTY

/s/ THOMAS P. McMAHON
 THOMAS P. McMAHON, OF COUNSEL
 Office and Post Office Address
 1028 Liberty Bank Building
 Buffalo 2, New York

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

• • • (Caption—3-CC-106 and 3-CB-439) • • •

ORDER DENYING MOTION

On September 29, 1960, Trial Examiner, Thomas F. Maher issued his Intermediate Report and Recommended Order in the above-entitled proceeding, and on the same date the proceeding was transferred to the Board. Thereafter, by telegram dated October 24, 1960, the Board, at the request of the Respondent, extended the time for filing exceptions and briefs to October 31, 1960. On October 27, 1960, the Charging Party filed a Motion to Adopt Findings, Conclusions and Recommendations of the Trial Examiner on the grounds that the Respondent's request for extension was untimely made, and on October 31, 1960 filed its brief in support of the Intermediate Report and Recommended Order. The Respondent, on October 31, 1960, filed exceptions to the Intermediate Report and Recommended Order and brief in support of its exceptions, and, on November 4, 1960, filed a statement in opposition to the Charging Party's motion. The Board having duly considered the motion.

IT IS HEREBY ORDERED that the motion filed by Carrier Corporation be, and it hereby is, denied as lacking in merit.

Dated, Washington, D. C., November 15, 1960.

By direction of the Board:

/s/ GEORGE A. LEET
George A. Leet
Associate Executive Secretary

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

* * * (Caption—3-CC-106 and 3-CB-439) * * *

DECISION AND ORDER

On September 29, 1960, Trial Examiner Thomas F. Maher issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report and a supporting brief. A brief was also filed by the Charging Party.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only insofar as consistent with our decision herein.

We agree with the trial Examiner, and for the reasons set forth in the Intermediate Report, that the Respondents engaged in conduct violative of Section 8(b)(1)(A) of the Act by the use of threats and physical force against employees of the Carrier Corporation, by obstructing, blocking and preventing the ingress and egress of Carrier employees at entrances to the Carrier plant, by obstructing the ingress and egress of New York Central Railroad Company personnel in the presence of

Carrier employees, and by assaulting peace officers in the presence of Carrier employees.

Contrary to the Trial Examiner, we do not find that the conduct of the Respondents engaged in on March 11, 1960, on the occasion of the switching of railroad cars and movement of Carrier products by the New York Central was violative of Section 8(b)(4)(i)(B) or 8(b)(4)(ii)(B).

As described in more detail in the Intermediate Report, the Carrier plant was bounded on the west by Thompson Road, and immediately south of the plant and extending in an east-west lateral was a spur of the New York Central, running easterly from the Lake Line of the railroad across Thompson Road. This spur was used to serve Carrier and other plants in the adjacent area. The railroad right-of-way, *which was owned by the railroad*, was enclosed by a chain link fence, along its south boundary, which fence was a continuation of one enclosing Carrier property along Thompson Road. Access to the right-of-way was provided by a chain link gate immediately east of the point where the spur crossed Thompson Road. On March 11, pursuant to arrangements made with Carrier the previous day, the railroad, under the operation of supervisory personnel, undertook to "spot" 14 empty box-cars at the Carrier plant and pick up a like number of loaded cars. In carrying out this work, the train made several passages through the Thompson Road gate, and it was at this point that the conduct complained of took place. The Trial Examiner found that by maintaining pickets at the Thompson Road railroad gate, by threatening railroad personnel, and by blocking the train's passage with the object of forcing or requiring the New York Central to cease handling or transporting Carrier products and otherwise doing business with Carrier, the Respond-

ents violated Section 8(b)(4)(i) and (ii)(B) of the Act. We disagree.

It cannot be disputed that the services performed by the New York Central on March 11 at the site of Carrier's plant were *services rendered in connection with the normal operations of Carrier*. This being the case, we are of the opinion that the decision of the Supreme Court in *Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO v. N. L. R. B.*, U. S., 48 LRRM 2210 is *dispositive* of the issue here. In that case, the Court had before it the issue of whether picketing by a union before a gate used exclusively by employees of independent contractors who worked on the struck employer's premises violated the secondary boycott provision of the Act. The Court said:

The key to the problem is found in the type of work that is being performed by those *who use the separate gate*. It is significant that the Board has since applied its rationale, first stated in the present case, only to situations where the independent workers were performing tasks unconnected to the normal operations of the struck employer—usually construction work on his buildings . . . In such situations, *the indicated limitations on picketing activity respect the balance of competing interests that Congress has required the Board to enforce. On the other hand, if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose task aid the employer's everyday operations.* The 1959 Amendments to the National Labor Relations Act, which removed the word "concerted" from the boycott provisions, included a proviso that "nothing contained in this clause (B) shall be constructed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." 29 U.S.C. (Supp. I, 1959) Sec. 158(b)(4)(B).

The proviso was directed against the fear that the removal of "concerted" from the statute might be interpreted so that "the picketing at the factory violated Section 8(b)(4)(A) because the pickets induce the truck driver employed by the trucker not to perform their usual services where an object is to compel the trucking firm not to do business with the . . . manufacturer during the strike." Analysis of the bill prepared by Senator Kennedy and Representative Thompson, 105 Cong. Rec. 16589.

In a case similar to the one now before us, the *Court of Appeals for the Second Circuit sustained the Board* in its application of Sec. 8(b)(4)(A) to a separate-gate situation. "There must be a separate gate, marked and set apart from other gates; the work done by the men who use the gate must be unrelated to the normal operations of the employer, and the work must be a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations." *United Steelworkers v. Labor Board*, Doc. No. 26252, decided May 3, 1961, 48 LRRM 2106. These seem to us controlling considerations. [Emphasis supplied.]

While the gate here through which the New York Central train passed was not one reserved by Carrier for the New York Central's use, but was in fact one on a right-of-way owned by the railroad, *we do not consider this fact to be material.*¹ The "key to the problem", as the Court stated, is to be found in the type of work being done by those

1. See authorities cited by the Trial Examiner in footnote 5 to his Intermediate Report. The right-of-way was conveyed to the railroad by Carrier in the first instance and the gate was an entrance directly into the Carrier premises which the railroad had to use in order to carry out its function of transporting Carrier products to and from the Carrier plant. The picketing in question took place at this entrance.

passing through the gate. If the work is unrelated to the normal operations of the primary employer, picketing at that gate will violate the secondary boycott prohibition of the Act. On the other hand, if this work is related to normal plant operations, the secondary boycott prohibition does not apply. As stated above, the services performed by New York Central for Carrier—the delivery of empty box cars to Carrier and the transportation of Carrier products—clearly were related to Carrier's normal operations. For this reason, we find that the Respondents did not violate Section 8(b)(4)(i)(B) or 8(b)(4)(ii)(B) by their conduct on March 11.²

2. Contrary to our dissenting colleague, we are not seeking to revive a doctrine that railroads and railroad employees are not, respectively, “employers” and “employees” within the meaning of the secondary boycott provisions of the Act. By its 1959 amendments, Congress underscored its intention to give railroads the protection against secondary boycotts accorded other employers. But it did not seek to give railroads or any other secondary employers immunity from lawful primary picketing at entrances to the premises of primary employers. This is further shown by the express proviso to Section 8(b)(4)(B), which Congress also adopted in 1959, namely, that “nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.”

Finally, we take issue with our dissenting colleague's view that the threatening of railroad personnel and the blocking of train passage at the picket line requires the finding of a Section 8(b)(4)(B) violation here. Such conduct, which we have already found to be unlawful under Section 8(b)(1)(A) of the Act, does not convert primary activity into conduct proscribed by the secondary boycott provisions. See *International Rice Milling Co. et al v. N.L.R.B.*, 341 U.S. 665 at page 672, where, in analogous circumstances involving violence and threats against sec-

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Local Union No. 5895, United Steelworkers of America, AFL-CIO; United Steelworkers of America, AFL-CIO; John Kowalski, Staff Representative of United Steelworkers of America, AFL-CIO; and Francis Brewster, President of Local Union No. 5895, United Steelworkers of America, AFL-CIO, their officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Restraining or coercing employees of Carrier Corporation in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act.

(a) Post in conspicuous places at their offices in Syracuse, New York, copies of the notice attached hereto as an Appendix.³ Copies of said notice to be

ondary employees at the primary picket line, the Supreme Court said "In the instant case the violence on the picket line is not material . . . The substitution of violent coercion in place of peaceful persuasion would not in itself bring the complained-of conduct into conflict with Section 8(b)(4). It is the object of union encouragement that is proscribed by that section, rather than the means adopted to make it felt." We perceive no difference in principle between the holding of the Supreme Court in that case and our conclusion in the instant case.

3. In the event that this Order is enforced by a Decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

furnished by the Regional Director of the Third Region, shall, after being duly signed by an authorized representative of the Respondent labor organizations, and by the respective individual Respondents, be posted immediately upon receipt thereof and maintained for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondents to insure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of the said notice to the Regional Director for the Third Region for posting by Carrier Corporation, if it is willing, at all locations where notices to its employees are customarily posted.

(c) Notify the Regional Director for the Third Region in writing within 10 days from the date of this Order what steps Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges the commission of unfair labor practices as set forth in paragraph 13(b), in paragraph 13(a) with respect to conduct of Roy Avery, Irving Talbot, and John Hunkins, and in paragraph 13(c) with respect to conduct of David Halstead, Larry Roach, Jay Sherman, and Frank Stirpe, and insofar as it alleges that the Respondents violated Section 8(b)(4)(i)(B) and 8(b)(4)(ii)(B) of the Act.

Dated, Washington, D. C. July 13, 1961.

/s/ Frank W. McCulloch, Chairman

/s/ Boyd Leedom, Member

/s/ John H. Fanning, Member

/s/ Gerald A. Brown, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

PHILIP RAY RODGERS, MEMBER, dissenting in part.

I agree with the majority that the Respondents violated Section 8(b)(1)(A) of the Act, but I cannot accept their holding that the Respondents' strike activity directed against the New York Central Railroad and its personnel is not proscribed by Section 8(b)(4)(i)(ii)(B).

First, I think that the majority's action here is in direct contravention of Congressional purpose legislated into law by the 1959 amendments to the Act. Prior to 1959, a Board majority (incorrectly, in my opinion) consistently held that railroads were not employers and railroad employees were not employees within the meaning of the secondary boycott provisions of the Act.⁴ This view of the majority never found judicial support,⁵ but whatever question might have existed about the scope of the protection afforded by the secondary boycott provisions should have been finally resolved by the 1959 amendments. Legislative history makes it abundantly clear that Congress intended to extend these provisions of the Act to railroads.⁶ However, the majority's decision effectively

4. *International Rice Milling Co., Inc.*, 84 NLRB 360; *Paper Makers Importing Co., Inc.*, 116 NLRB 267; *W. T. Smith Lumber Company*, 116 NLRB 1756; *The Alling & Cory Company*, 121 NLRB 315; *Louisville Cap Co.*, 121 NLRB 1154; *Great Northern Railway Company*, 122 NLRB 1403; *American Coal Shipping, Inc.*, 124 NLRB 1079. See also *U & Me Transfer*, 119 NLRB 852. Note my dissents in the *Paper Makers*, *Smith Lumber*, *Louisville Cap* and *American Coal* cases.

5. See *International Rice Milling Co., Inc. v. N.L.R.B.*, 183 F. 2d 21 (C.A.5); *W. T. Smith Lumber Company v. N.L.R.B.*, 246 F. 2d 129 (C.A.5); *Great Northern Railway Company v. N.L.R.B.*, 272 F. 2d 741 (C.A.9).

6. *NLRB Legislative History of Labor-Management Reporting and Disclosure Act of 1959*, pp. 1079, 1522-1523, 1581, 1712, 1857.

thwarts that Congressional intent and leaves railroads and their employees in no better position than that existing prior to the 1959 amendments. For if it is not unlawful, as the majority holds, for a union to go upon a railroad's tracks for the purpose of involving that railroad in the union's dispute with the primary employer, then the efforts of Congress in this respect have gone for naught.

Secondly, in my opinion the majority's reliance upon the Supreme Court's decision in *Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO v. N.L.R.B.*, U.S. , 48 LRRM 2210, is misplaced. For one reason, this is not a "reserved gate" situation. Carrier had not "reserved" the Thompson Road entrance for New York Central's use. This gate belonged to New York Central, was on New York Central's right-of-way, and the strike activity directed against the railroad and its operating personnel occurred not on Carrier property but on that right-of-way owned by New York Central. To me, it is unrealistic to say that when a union goes on the property of a secondary employer for the sole purpose of inducing and encouraging secondary employees and threatening, restraining and coercing the secondary employer that such is primary activity.

For another reason, the Supreme Court, in its opinion, emphasized the fact that the strike activity of the union there consisted of *peaceful* picketing. The Respondents' conduct here—the threatening of Train Master Bowes and other railroad personnel, and the blocking of the train's passage—could hardly be characterized as peaceful activity. I agree with the Trial Examiner that by such conduct the Respondents both unlawfully induced individuals employed by New York Central and unlawfully restrained and coerced the railroad itself. With particular reference to the latter, I cannot see how, under any circumstance,

the threatening, restraining or coercing of any employer could escape the Act's sanction irrespective of where the employer might be at the time. Presumably, under the majority's theory, if a union threatens a secondary employer at his place of business this would violate the Act; but if this threat is delivered near the scene of the dispute this is not unlawful. I can see no rational basis for such a distinction. Certainly, this section of the Act does not call for any recognition of a "right", as an incident to strike activity, to threaten any one at any place; nor are there any conflicting legitimate interests, which similarly subsumes a "right" of a union to threaten, to be balanced.'

Philip Ray Rodgers, Member

7. *International Rice Milling Co., et al v. N.L.R.B.*, 341 U.S. 665, does not support my colleagues' holding. There, the Court found that the Union had not induced *concerted* conduct by secondary employees. Inducement of *concerted* conduct was an element of the violation of Section 8(b)(4) under Taft-Hartley, and, obviously, it was immaterial what kind of conduct a union engaged in—violent or otherwise—if that element was missing. I think it should be pointed out that the Act has been amended, that inducement of concerted conduct is no longer an element of an 8(b)(4) violation, and, more importantly, the conduct engaged in by the Union here is now expressly prohibited by Section 8(b)(4)(B).

APPENDIX

NOTICE

TO ALL OUR OFFICERS, AGENTS, REPRESENTA-
TIVES AND MEMBERS

TO ALL EMPLOYEES OF CARRIER CORPORATION
PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to
effectuate the policies of the National Labor Relations Act,
as amended, you are hereby notified that;

WE WILL NOT restrain or coerce employees of
CARRIER CORPORATION in the exercise of
rights guaranteed them by the National Labor
Relations Act, as amended.

FRANCIS BREWSTER, *President*
LOCAL UNION 5895

By

LOCAL UNION No 5895, UNITED
STEELWORKERS OF AMERICA,
AFL-CIO

.....
President

Dated

JOHN KOWALSKI, *Staff Representative*

UNITED STEELWORKERS OF
AMERICA, AFL-CIO

By

UNITED STEELWORKERS OF
AMERICA, AFL-CIO

.....
Staff Representative

Dated

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CARRIER CORPORATION,

Petitioner,

v.

No. 27079

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**PETITION FOR REVIEW OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD**

Pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 141, et seq.), petitioner named in the caption, petitions this Court to review and modify or partially set aside the Decision and Order of the National Labor Relations Board entered on July 13, 1961 in a proceeding identified upon the records of the Board as Case No. 3-CC-106, consolidated with Case No. 3-CB-439, in which the charging party is petitioner herein.

1. Upon due proceedings had before the Board in said matter, a trial examiner issued his Intermediate Report on the 29th day of September, 1960, in which he made findings of fact and conclusions of law finding that Local Union No. 5895, United Steelworkers of America, AFL-CIO; United Steelworkers of America, AFL-CIO; John Kowalski, Staff Representative of United Steelworkers of America, AFL-CIO; and Francis Brewster, President of Local Union No. 5895, United Steelworkers of America, AFL-CIO, the parties charged, had engaged in unfair labor practices and issued recommendations based thereon. By telegram dated October 24, 1960, the Board, at the request of the parties charged extended the time for filing excep-

tions and briefs to said Intermediate Report to October 31, 1960. On October 27, 1960, petitioner filed a motion to adopt findings, conclusions, and recommendations of the trial examiner, which motion was denied by the Board on November 15, 1960. Thereafter, upon exceptions filed with the National Labor Relations Board by the parties charged that Board, on July 13, 1961 issued its Decision and Order in the aforesaid proceedings, sustaining certain of said exceptions. Petitioner seeks review and modification of the Board's Decision and Order.

2. This Court has jurisdiction under Section 10(f) of the National Labor Relation Act, as amended, the alleged unfair labor practices having been alleged to have been engaged in at Syracuse, New York and petitioner, a corporation organized and existing under and by virtue of the laws of the State of Delaware, having its principal office, certain manufacturing plants and place of business, and transacting business in Syracuse, New York, within the Second Judicial Circuit. Petitioner, the charging party in the proceedings before the National Labor Relations Board, is a person aggrieved by the Board's Order.

3. The action of the Board is not supported by substantial evidence on the record or by applicable law and is arbitrary and capricious and an abuse of discretion.

WHEREFORE, Petitioner prays that this Court modify or partially set aside the Board's Decision and Order and

grant such other and further relief as may be just and proper.

Respectfully submitted,

CARRIER CORPORATION
Carrier Parkway
Syracuse 1, New York

By /s/ DAVID W. JASPER

DAVID W. JASPER, Esq.,
Vice President and
General Counsel

HANCOCK, DORR, RYAN & SHOVE
Hills Building
Syracuse, New York

By /s/ JOHN E. LYNCH

JOHN E. LYNCH, Esq.
Its Attorneys

Of Counsel:

THEOPHIL C. KAMMHOLZ, Esq.
Vedder, Price, Kaufman & Kammholz
105 South LaSalle Street
Chicago 3, Illinois

KENNETH C. McGUINNESS, Esq.
Vedder, Price, Kaufman & Kammholz
1511 K Street, N.W.
Washington 5, D.C.

DATED: July 14, 1961

UNITED STATES COURT OF APPEALS

• • • (Caption—27,079) • • •

**ANSWER OF NATIONAL LABOR RELATIONS BOARD
TO PETITION FOR REVIEW OF ITS ORDER**

The National Labor Relations Board, by its Assistant General Counsel, pursuant to the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C., Sec. 151 *et seq.*, as amended by 73 Stat. 519), hereinafter called the Act, files this answer to the petition for review of an order of the Board issued on July 13, 1961.

1. The Board admits the allegations in paragraph 1 of the petition, except that the date of the Order of the Board was July 13, 1961. The Board further says that exceptions to the Intermediate Report of the Trial Examiner and a supporting brief were filed by respondents on October 31, 1960.

2. The Board admits the allegation in paragraph 2 of the petition.

3. The Board denies the allegations of error contained in paragraph 3 of the petition.

4. Further answering said petition, the Board avers that the proceedings had before it, the findings of fact, conclusions of law, and Order of the Board were and are in all respects valid and proper under the Act.

5. The Board is on this date filing a motion to consolidate the above captioned cause with the case known on the Court's docket as *National Labor Relations Board v. Local No. 5895, United Steelworkers of America, AFL-CIO, et al.*, in which a petition for enforcement of the Board's Order against the respondents therein has this date been filed.

6. Pursuant to Section 10 (e) and (f) of the Act and the Rules of this Court, the Board will file before August 23,

1961, with the Court a certified list of documents, transcript of testimony, exhibits and other materials comprising the entire record of the consolidated proceeding before the Board in Case Nos. 3-CC-106 and 3-CB-439.

WHEREFORE, the Board prays that the Court enter a decree denying the petition for review.

/s/ **MARCEL MALLET-PREVOST**
Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 2nd day of August, 1961.

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

**LOCAL UNION NO. 5895, UNITED STEEL-
WORKERS OF AMERICA, AFL-CIO;
UNITED STEELWORKERS OF AMERICA,
AFL-CIO; JOHN KOWALSKI, STAFF
REPRESENTATIVE OF UNITED STEEL-
WORKERS OF AMERICA, AFL-CIO; AND
FRANCIS BREWSTER, PRESIDENT OF
LOCAL UNION NO. 5895, UNITED STEEL-
WORKERS OF AMERICA, AFL-CIO,**
Respondents.

No. 27105

**PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

To the Honorable, the Judges of the United States
Court of Appeals for the Second Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondents, Local Union No. 5895, United Steelworkers of America, AFL-CIO; United Steelworkers of America, AFL-CIO; John Kowalski, Staff Representative of United Steelworkers of America, AFL-CIO; and Francis Brewster, President of Local Union No. 5895, United Steelworkers of America, AFL-CIO, their officers, agents, representatives, successors, and assigns. The proceeding resulting in said Order is

known upon the records of the Board as Case Nos. 3-CC-106 and 3-CB-439.

In support of this petition the Board respectfully shows:

(1) Respondent Unions are labor organizations engaged in promoting and protecting the interests of their members in the State of New York, and John Kowalski and Francis Brewster are officers or agents, all within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on July 13, 1961, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondents, their officers, agents, representatives, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondents by sending copies thereof postpaid, bearing Government frank, by registered mail, to Respondents' counsel.

(3) On July 14, 1961, pursuant to Section 10 (f) of the Act, *Carrier Corporation*, charging party in the Board's proceeding, filed with this Court a petition to review the Board's Decision and Order. Said petition appears on the docket of the Court as No. 27,079, *Carrier Corporation v. National Labor Relations Board*. The Board is filing its Answer, wherein the Board requests the Court to deny said petition to review, together with the instant petition for enforcement.

(4) In accordance with said Petition to Review and pursuant to Section 10 (e) of the National Labor Relations Act, as amended, and pursuant to Rule 13 (g) of this Court, the Board will file with this Court before August 23,

1961, a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced. This same certified list also constitutes the certified record in the instant proceeding.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing those sections of the Board's said Order which relate specifically to the Respondents herein, and requiring Respondents, their officers, agents, representatives, successors, and assigns, to comply therewith.

/s/ MARCEL MALLET-PREVOST
 Marcel Mallet-Prevost
 Assistant General Counsel
 NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
 this 2nd day of August, 1961.

UNITED STATES COURT OF APPEALS

*** (Caption 27079 and 27105) ***

**ANSWER OF RESPONDENTS TO PETITION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

United Steelworkers of America, AFL-CIO, and Local Union No. 5895, United Steelworkers of America, by their attorney, McMahon & Crotty (Thomas P. McMahon of Counsel) and Isadore Greenberg, Esq., files this Answer to the petition for enforcement of an Order of the National Labor Relations Board against Respondents:

1. Admits the allegations in the paragraph numbered "one" of the petition except to state that JOHN KOWALSKI nor FRANCIS BREWSTER were respectively staff Representative and Local Union President on or about March 11, 1960, neither man is now, nor has he been for some time prior to the filing of this Answer, the holder of such titles or positions.

2. Admits so much of the allegations contained in the paragraph numbered "2", as alleges the stating of findings of facts, conclusions of law, the issuance of an Order and service by registered mail.

3. Respondents further incorporate each and every exception, and objection advanced upon the record before the Board.

WHEREFORE, the answering Respondents pray that the Court enter a decree denying the petition for review.

McMAHON & CROTTY

By /s/ **THOMAS P. McMAHON**
THOMAS P. McMAHON
 Office and Post Office Address
 1028 Liberty Bank Building
 Buffalo 2, New York

Dated at Buffalo, New York
 this 24th day of August, 1961.

Cc: **Marcel Mallet-Prevost**
 Assistant General Counsel
 National Labor Relations Board, Washington

Hancock, Dorr, Ryan & Shove, Esqs.
 Att: **John E. Lynch, Esq.**
 Hills Building
 Syracuse, New York

o **Vedder, Price, Kaufman & Kammholz, Esqs.**
 Att: **Kenneth C. McGuinness, Esq.**
 1511 K Street, N.W.
 Washington 5, D. C.

David W. Jasper, Esq.
 c/o Carrier Corporation
 Carrier Parkway
 Syracuse 1, New York

Merle D. Vincent, Regional Director
 Third Region, N.L.R.B.
 Buffalo, New York

[fol. 385].

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 198—September Term, 1961

Argued February 5, 1962

Docket No. 27079

CARRIER CORPORATION, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

Before: LUMBARD, Chief Judge, SWAN and WATERMAN,
Circuit Judges.

Petition-by employer to review and modify order of the National Labor Relations Board, 132 N.L.R.B. No. 17, dismissing charges that union had violated §§ 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act by picketing gate to railroad right of way adjacent to employer's premises while the railroad was performing services incident to the normal operations of the employer.

Petition granted.

Theophil C. Kammholz, Chicago, Illinois (Kenneth C. McGuiness, Washington, D. C., David W. Jasper and John E. Lynch, Syracuse, New York, on the brief) for petitioner.

[fol. 386] Melvin J. Welles, National Labor Relations Board, Washington, D. C. (Stuart Rothman, General Counsel, Dominick L. Manoli, Assoc. General Counsel, Marcel Mallet-Prevost, Asst. General Counsel and Hans J. Lehmann, on the brief) for respondent.

Jerry D. Anker, Washington, D. C. (David E. Feller and Feller, Bredhoff & Anker, and Thomas P.

McMahon, Buffalo, New York, on the brief) for United Steelworkers of America, AFL-CIO, and its Local Union 5895, interveners.

Gerald E. Dwyer, New York, N. Y., and Gregory S. Prince, Philip F. Welsh and Carl V. Lyon, Washington, D. C., on the brief for Association of American Railroads, *amicus curiae*.

OPINION—October 18, 1962

WATERMAN, Circuit Judge:

On March 2, 1960, members of Local 5895, United Steel Workers of America, went on strike against Carrier Corporation. Carrier's plant is located in Syracuse, New York, and a substantial amount of its products are shipped from there in interstate commerce. Upon instituting the strike pickets were maintained at numerous entrances to the Carrier plant. A picket line was also established at a gate, described more fully hereafter, on a right of way owned by the New York Central Railroad. Based, on charges by Carrier, the Board filed a complaint against the Union and its officers, alleging violations of §§ 8(b)(1)(A), 8(b)(4)(i) and 8(b)(4)(ii)(B) of the National Labor Relations Act. A hearing was held upon the complaint and [fol. 387] the Trial Examiner found that the picketing violated § 8(b)(1)(A) of the Act. The Board entered an order on July 13, 1961, requiring the union to cease and desist from the violation and to take other appropriate action. The union does not contest this portion of the order, and a consent decree providing for its enforcement has been entered.¹

The Trial Examiner also found that the picketing on the railroad right of way constituted a violation of §§ 8(b)(4)(i) and 8(b)(4)(ii)(B) of the Act, but the Board held, one member dissenting, that those sections had not been violated. By its petition in this court, Carrier seeks modification of this latter portion of the decision and order

¹ It is unnecessary to refer further to this portion of the Board's order.

of the Board. The Association of American Railroads, as *amicus curiae*, has filed a brief supporting Carrier's petition. Local 5895 has intervened in support of the Board's position.

The question for decision is whether it is a violation of §§ 8(b)(4)(i) and of (ii)(B) for a union to picket a railroad right of way adjacent to the employer's premises, when it is the manifest objective of such picketing to prevent employees of the railroad from handling the goods of the struck employer in the course of regular delivery and removal operations. In agreement with the Trial Examiner and the dissenting member of the Board, we hold that it is.

The facts, as stated by the Board, are as follows:

"As described in more detail in the Intermediate Report, the Carrier plant was bounded on the west by Thompson Road, and immediately south of the plant and extending in an east-west lateral was a spur of the New York Central, running easterly from the Lake Line of the railroad across Thompson [fol. 388] Road. This spur was used to serve Carrier and other plants in the adjacent area. The railroad right-of-way, *which was owned by the railroad*, was enclosed by a chain link fence along its south boundary, which fence was a continuation of one enclosing Carrier property along Thompson Road. Access to the right-of-way was provided by a chain link gate immediately east of the point where the spur crossed Thompson Road.² On March 11, pursuant to arrangements made with Carrier the previous day, the railroad, under the operation of supervisory personnel, undertook to 'spot' 14 empty boxcars at the Carrier plant and pick up a like number of loaded cars. In carrying out this work, the train made several passages through the Thompson Road gate, and it was at

² The Trial Examiner's findings show that this gate was padlocked when not opened for railroad switching operations. Railroad personnel held the key to the gate, which could also be opened by a master key, held by Carrier employees, to locks on Carrier property. Carrier employees were not permitted to use this gate to get access to the Carrier plant.

this point that the conduct complained of took place. The Trial Examiner found that by maintaining pickets at the Thompson Road railroad gate, by threatening railroad personnel, and by blocking the train's passage with the object of forcing or requiring the New York Central to cease handling or transporting Carrier products and otherwise doing business with Carrier, the Respondents violated Section 8(b)(4)(i) and (ii)(B) of the Act."

Section 8(b)(4) of the National Labor Relations Act, as amended by 73 Stat. 542 (1959), 29 U. S. C. § 158(b)(4), is one of the provisions of the Act directed against secondary boycotts. *NLRB v. Denver Building and Const. Trades Council*, 341 U. S. 675, 686 (1951). Its purpose is [fol. 389] to prevent the enlargement of labor disputes which occurs when a neutral bystander is enmeshed in a controversy not his own. To this end, unions are prohibited from bringing certain pressures to bear on neutral employers and their employees, pressures which have as their goal that of forcing these secondary parties to break off business relations with the primary employer. The language of the Act is broad enough to apply whether the forbidden objective is brought about directly, as by interference with suppliers or customers of a struck employer, *Local 1976, United Brotherhood of Carpenters and Joiners v. NLRB*, 357 U. S. 93 (1958), or indirectly, as by interference with third party suppliers or customers of a neutral employer who, by these pressures, is forced to break off dealings with the primary employer. *United Brotherhood of Carpenters and Joiners (Wadsworth Building Co.)*, 81 N.L.R.B. 802 (1949).

Section 8(b)(4) makes it an unfair labor practice for a union:

(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles,

materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any [fol. 390] other person * * * *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing * * *

It is clear that the activities here in question violate the statute if the statute is read literally. Since the earliest days of the Taft-Hartley Act, however, these sections and their predecessor section prior to the 1959 amendments, § 8(b)(4)(A), have received a complex interpretive gloss.

* Prior to the amendment of Section 8(b)(4) in 1959, the substantive provisions of Section 8(b)(4)(B) were found in Section 8(b)(4)(A) of the Taft-Hartley Act, which reads as follows:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) to engage in, or to induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. 61 Stat. 136 (1947).

All of the cases cited in this opinion have dealt with labor practices which occurred *prior* to the 1959 amendments. We do not consider this fact to be material however, since both the purpose and effect of the amendment would appear to be that of *strengthening* rather than weakening the Act's proscriptions against secondary boycott activities.

"Section 8(b)(4) must be interpreted and not merely read literally." *Seafarers Int'l Union, etc. v. NLRB*, 265 F. 2d 585, 591 (D. C. Cir. 1959). "This provision could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary activity." *Local 761, Int'l Union of Electrical, Radio & Machine Workers v. NLRB*, 366 U. S. 667, 672 (1961).

[fol. 391] The basic difficulty one encounters with a literal reading is that traditional picketing around the premises of an employer with whom a union has a dispute almost inevitably involves some interference with the relations between that employer and his suppliers or customers. "A strike, by its very nature, inconveniences those who customarily do business with the struck employer." *Oil Workers Int'l Union (Pure Oil Co.), 84 N. L. R. B. 315, 318 (1949)*. "The cases recognize the very practical fact that, intended or not, sought for or not, aimed for or not, employees of neutral employers do take action sympathetic with strikers and do put pressure on their own employers." *Seafarers Int'l Union, etc. v. NLRB*, 265 F. 2d 585, 590 (D. C. Cir. 1959). Thus, "[i]t is clear that, when a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all persons will honor the picket line, and that hope encompasses the employees of neutral employers who may in the course of their employment (deliverymen and the like) have to enter the premises." *Id.* at 591.

Moreover, it was clear from the legislative history of the Act and was made explicitly clear by the 1959 amendments that Congress did not, by § 8(b)(4), intend to outlaw traditional primary strike activity or traditional methods of picketing.

To accommodate the apparent conflict between the literal language of the statute on the one hand, and, on the other, the Congressional purpose, the Board and the courts have evolved the "primary-secondary activity" distinction. The line that has been drawn between the two kinds of activity has been uncertain and wavering, involving distinctions "more nice than obvious." *Local 761 Int'l Union of Electrical, Radio & Machine Workers, supra* at 674. What is worse, the conceptual dichotomy has been ambig-

uous. In some cases decision as to whether union activity [fol. 392] was "primary" or "secondary" has turned on whether the activity was encompassed within a literal reading of the act or affected secondary employers, and it was immaterial to the result whether the activity was, in the end, held to be unlawful under § 8(b)(4). *NLRB v. Business Machine & Office Appliance Mechanics Conference Board (Royal Typewriter Co.)*, 228 F. 2d 553 (2 Cir. 1955), cert. denied, 351 U. S. 553. In other cases, the labels "primary" and "secondary" were purely conclusionary appellations, the choice of label turning upon whether a particular activity or complex of activities was ultimately held to violate, or to be immune from, the proscriptions of § 8(b)(4). *Int'l Brotherhood of Teamsters, Local 807 (Schultz Refrigerated Service)*, 87 N. L. R. B. 504 (1949). In all events, where picketing was limited to the premises of the primary employer, the Board and the courts, by adopting this distinction between primary and secondary activities, exempted from the proscription of § 8(b)(4) many activities covered by the subsection's literal language. *United Electrical, Radio and Machine Workers (Ryan Construction Corp.)*, 85 N. L. R. B. 417 (1949); *Di Giorgio Fruit Corp. v. N. L. R. B.*, 191 F. 2d 642 (D. C. Cir. 1951); *Milwaukee Plywood Co. v. N. L. R. B.*, 285 F. 2d 325 (7 Cir. 1960); cf. *Local 761*, *supra*. These cases are not dispositive of the issue before us, inasmuch as here the union's activities took place not on the premises of the Carrier Corporation but on an adjacent right of way owned by the New York Central Railroad.

However, exceptions to a literal reading of the prescriptions of § 8(b)(4) have not been limited to cases of picketing on the premises of the primary employer. Occasionally, the job site in relation to which a dispute arises is located on the premises of a neutral third party. In such circumstances the unions involved have claimed their traditional right to picket at the job site. To deal with this [fol. 393] class of cases the Board has utilized a "situs of the dispute" concept. Although the situs of the dispute is normally at the premises of the primary employer, an application of this concept permits extension, in appropriate circumstances, of traditional union activity to neutral

construction sites, *NLRB v. Denver Building & Const. Trades Council*, 341 U. S. 675 (1951), to ambulatory vehicles in the trucking industry, *Int'l Brotherhood of Teamsters, Local 807 (Schultz Refrigerated Service)*, *supra*, or to a ship moored at the dry dock of a neutral employer, *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547 (1950). Within limitations to be discussed hereafter, picketing at such places has, in some cases, been held lawful under the act, even though incidental injury has been suffered by neutral employers occupying the common situs. But these "common" or "ambulatory" situs cases are no more dispositive of the issue before us than are those cases involving the picketing of the primary employer's premises, for no employee of Carrier Corporation worked on the railroad right of way either before or during the strike.

Indeed, we find no controlling authority to enlighten us, and, absent controlling authority, we must find our decisional guidelines behind the disparate facts of prior dissimilar cases. In doing so, we are mindful of the warning of the Supreme Court in *Local 1976, United Brotherhood of Carpenters & Joiners v. NLRB*, 357 U. S. 93, 99-100 (1958):

"It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. [fol. 394] This is relevant in that it counsels wariness in finding by construction a broad policy against secondary boycotts as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment into enacted law."

We are aware, no less, that "[t]he nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer." *Local 761, supra* at 674. Nevertheless, distrust of quick

formulae does not lead us to the opposite evil of over-reliance upon finely spun factual distinctions having no basis in legislative history or in reason. Ours is the task of principled decision, and Congress could have intended no less when it enacted the statute and placed upon us the duty to review orders of the Board thereunder.

Relevant prior constructions of § 8(b)(4) can best be understood, perhaps, when divided into two time periods.

I

The first period, beginning with the enactment of the Taft-Hartley Act in 1947, and terminating in 1952, may be characterized by relatively narrow constructions of § 8(b)(4) by the NLRB. The cases may be further subdivided into those involving picketing at the premises of the primary employer and those involving picketing at neutral premises.

From the earliest cases, the Board ruled that all picketing at the premises of the primary employer was immune from the proscriptions of § 8(b)(4)(A). Relying on the legislative history rather than the language of the statute, the Board maintained this position, even when it was clear [fol. 395] that the picketing could have no appeal but to employees of neutral employers. Thus, in *United Electrical, Radio and Machine Workers (Ryan Construction Corp.)*, 85 N.L.R.B. 417 (1949), the union, in support of its dispute with the primary employer Bucyrus, picketed the entire Bucyrus premises, including a separate gate that had been cut through the fence to provide ingress for Ryan employees to the site of a construction project Ryan was performing for Bucyrus. Ruling that the activity was "primary picketing" outside the proscriptions of § 8(b)(4)(A), the Board stated that the provision "was intended only to outlaw certain secondary boycotts, whereby unions sought to enlarge the economic battleground beyond the premises of the primary employer. When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called 'secondary' even though, as is virtually always the case, an object of the picketing is to dissuade all persons from

entering such premises for business reasons." *Id.* at 418. And see *Oil Workers Int'l Union (Pure Oil Co.)*, 84 N.L.R.B. 315 (1949).

Where picketing activities had taken place on neutral premises, the early cases were in substantial confusion. In some, the Board, still conceding the existence of the objective proscribed by the Act, attempted to carve out a new and broader geographical area of immunity based, now, on the notion of "the situs of the dispute," or "the area of primary conduct." Thus, in *Int'l Brotherhood of Teamsters, Local 807 (Schultz Refrigerated Service)*, 87 N.L.R.B. 504 (1949), Schultz had moved its place of business from New York City to New Jersey, replacing members of Local 807 by drivers from a New Jersey local. In ruling that the displaced drivers might picket around the trucks while they were being loaded or unloaded at the premises of New York City customers, the Board stated:

[fol. 396] "Plainly, the object of all picketing at all times is to influence third persons to withhold their business or services from the struck employer. *In this respect there is no distinction between lawful primary picketing and unlawful secondary picketing proscribed by § 8(b)(4)(A).* Necessarily then; one important test of the lawfulness of a union's picketing activities in the course of its dispute with an employer is the identification of such picketing with the actual functioning of the primary employer's business at the situs of the labor dispute." *Id.* at 505. (Emphasis added.)

Within this "area of primary conduct," therefore, the union could "lawfully persuade all persons, including in this case the employees of Schultz' customers and consignees, to cease doing business with the struck employer." *Id.* at 504. In *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N. L. R. B. 547 (1950), the Board imposed limitations, in the form of the often-quoted "Moore Dry Dock Conditions," upon a union's right to picket at the situs of a dispute located on neutral premises:

"In the kind of situation that exists in this case, we believe that picketing of the premises of a secondary

employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer." *Id.* at 549.

[fol. 397] The limitations were designed, once again, to prove less the issue of intent *under* the statute, however, than to isolate spatio-temporal areas of exemption from its operation. The rationale justifying this approach was the underlying intent of Congress, in enacting § 8(b)(4)(A), not to interfere with traditional "primary activities" of striking unions.

Although *Schultz* and *Moore Dry Dock* are consistent with the Board's approach to contemporaneous cases involving the picketing of a primary employer's premises, they are not easily reconciled with three closely-preceding "neutral" or "common-situs" Board decisions: *Local 74, United Brotherhood of Carpenters (I. A. Watson Co.)*, 80 N.L.R.B. 533 (1948); *Int'l Brotherhood of Electrical Workers, Local 501 (Samuel Langer)*, 82 N.L.R.B. 1028 (1949); and *Denver Building and Const. Trades Council*, 82 N.L.R.B. 1195 (1949). All three involved disputes concerning the use of non-union employees at construction sites. In the *Watson* case, the owner of certain premises contracted with members of the respondent union to renovate a dwelling. Subsequently, the owner contracted with the *Watson Co.*, an employer of non-union labor whom the respondent had unsuccessfully sought to organize in the past, to install wall and floor coverings in the project. When an officer of the respondent learned of the situation, he ordered members of the union off the job. In *Langer* and *Denver* the general contractors of construction projects were the ones who subcontracted portions of the jobs to employers of non-union men. The respondent unions again had had long-standing disputes with the errant subcontractors in each case. When the construction sites were picketed,

union employees of other subcontractors walked off the job. In each of these three cases the Board, without hesitation, found a violation of § 8(b)(4)(A), despite the fact that picketing was limited to the situs of the dispute and met [fol. 398] the soon-to-be-announced Moore Dry Dock criteria for picketing neutral premises. Rather than relying on the primary-secondary activity distinction, the Board founded its complaint, in each case, upon the fact that an objective of the unions' actions was to force the general contractors in *Denver* and *Langer*, and the owner in *Watson*, to cancel their contracts with the subcontractor-employers of non-union men.

Toward the end of this first period,⁴ the Supreme Court, in four decisions handed down on June 4, 1951, took the opportunity to review the early Board interpretations of § 8(b)(4)(A). In *NLRB v. International Rice Milling Co.*, 341 U. S. 665 (1951), members of the International Brotherhood of Teamsters had picketed the premises of the Kaplan Rice Mills, Inc. for purposes of securing recognition of the union as the collective bargaining representative of the mill employees. During the course of their picketing, the members sought to encourage the drivers of the truck of

⁴ Two Board decisions during the period dealt with union activities at places which were neither the premises of the primary employer nor the situs of the dispute. In *Amalgamated Meat Cutters & Butchers Workmen (Western, Inc.)*, 93 N. L. R. B. 336 (1951) the Board ruled without hesitation that it was violative of § 8(b)(4)(A) for union members to go to the premises of neutral customers there to encourage their employees to refuse to handle the primary employer's meat products. In *Newspaper & Mail Deliverer's Union (Interborough News Co.)*, 90 N. L. R. B. 2135 (1950) however, where union members had gone to the premises of neutral suppliers to encourage their employees not to deliver newspapers to the primary employer's news stands, the Board found no violation on the ground that the conduct "invited action only at the premises of the primary employer." *Id.* at 2135. The union entreaties to neutral employees sought inaction, however, rather than action. That being the case, we find it anomalous to locate the response to the entreaties at one place rather than another. We are unable, thus, to distinguish *Interborough* from subsequent contrary Board rulings in *Western, Inc.*, *supra*, and *Chauffeurs, Teamsters & Helpers, Local 175 (McJunkin Corp.)*, 128 N. L. R. B. 522 (1960).

a neutral customer to refrain from entering the premises to pick up an order of goods. Citing *Oil Workers Int'l [fol. 399] Union (Pure Oil Co.)*, *supra*, the Board had dismissed the complaint on the ground that the union's activities were merely "primary picketing" of the Kaplan mill and were carried out in the immediate vicinity of the mill. Although approving the Board's dismissal of the complaint, the Court rested its action upon a wholly different rationale from that enunciated by the Board in *Ryan* and *Pure Oil*:

"The limitation of the complaint to an incident in the geographically restricted area near the mill is significant, although not necessarily conclusive. The picketing was directed at the Kaplan employees and at their employer in a manner traditional in labor disputes. Clearly, that, in itself, was not proscribed by § 8(b)(4). Insofar as the union's efforts were directed beyond that and toward the employees of anyone other than Kaplan, there is no suggestion that the union sought concerted conduct by such other employees. 341 U. S. 671.

A sufficient answer to this claimed violation of the section is that the union's picketing and its encouragement of the men on the truck did not amount to such an inducement or encouragement to 'concerted' activity as the section proscribes. *Id.* at 670.

A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of § 8(b)(4), and they do not here. *Id.* at 671."

Although the Court's specific *ratio decidendi* in *International Rice* was not to survive the 1959 amendments by [fol. 400] which the requirement of § 8(b)(4) that "concerted" action be encouraged was eliminated,³ its basic approach to the case was to have profound effects upon subse-

³ See footnote 3, *supra*.

quent constructions of the statute. No longer were there geographical areas exempted from the operation of § 8(b)(4). Analysis of the legitimacy of union activities was to proceed by an examination of *intent* or *objectives* when neutrals were threatened harm by a labor dispute not their own.

The remaining three cases decided by the Court on June 4, 1951, together with *International Rice*, furthered this analysis in the context of "common situs" picketing. In *NLRB v. Denver Building and Const. Trades Council*, 341 U. S. 675 (1951); *Int'l Brotherhood of Electrical Workers, Local 501 v. NLRB*, 341 U. S. 694 (1951); and *Local 74, United Brotherhood of Carpenters and Joiners v. NLRB*, 341 U. S. 707 (1951), the Court approved the Board's finding below of a violation of § 8(b)(4)(A) in *Denver, Langer* and *Watson*, respectively. In finding that the statute had been violated the centrality of the unions' objectives was emphasized:

"It was an object of the strike to force the contractor to terminate Gould & Preisner's subcontract.

"We hold . . . that a strike with such an object was an unfair labor practice within the meaning of § 8(b)(4)(A).

"It is not necessary to find that the *sole* object of the strike was that of forcing the contractor to terminate the subcontractor's contract. This is emphasized in the legislative history of the section."

"Senator Taft, sponsor of the bill, stated in his supplementary analysis of it as passed: 'Section 8(b)(4), relating to illegal strikes and boycotts, was amended in conference by striking out the words "for the purpose of" and inserting the clause "where an object thereof is." 93 Cong. Rec. 6859."

Denver Building and Construction Trades Council, supra at 689.

Though these four decisions handed down by the Supreme Court on June 4, 1951, set the basic approach to

subsequent constructions of the statute, fundamental problems still remained. To find a violation of § 8(b)(4) it was sufficient that an object of a union's actions was to interfere with business relations between the primary employer and neutral third parties. However, the Board had recognized, as Judge Prettyman stated some years later, that "when a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all persons will honor the picket line, and that hope encompasses the employees of neutral employers who may in the course of their employment . . . have to enter the premises." *Seafarers Int'l Union etc. v. NLRB*, 265 F. 2d 585, 591 (D. C. Cir. 1959). It was clear, thus, that harm to neutral employers could be justified under the Act, not because the harm occurred at exempted locations, but only if it occurred as an incidental effect of the union's pursuit of legitimate strike objectives. *NLRB v. Service Trade Chauffeurs, Local 145*, 191 F. 2d 65, 67 (2 Cir. 1951). It remained (1) to identify the strike objectives which under the Act were legitimate as distinguished from hoped-for results which, if incidentally accomplished, could be permissible but which could not be independently pursued, and (2) to establish [fol. 402] evidentiary guidelines by which the true objectives of union activity could be ascertained in the absence of an admission of illegal intent.

II

During the second of the time periods, 1952 to date, into which we have separated the decisions construing § 8(b)(4), substantial progress was made in solving the two problems mentioned above. Concomitant with that progress the statute received broader readings from the Board and the courts.

The leading case of the period was *Brewery and Beverage Drivers and Workers, Local 67 (Washington Coca Cola Bottling Works, Inc.)*, 107 N. L. R. B. 299 (1953). There, the respondent union, after calling a recognitional strike against Washington Coca Cola, picketed not only the plant, but the company's delivery trucks as they made their rounds to customers' premises. Although the activity ap-

peared to comply with the four *Moore Dry Dock* criteria for picketing an ambulatory situs of dispute, and closely paralleled approved union activities in *Schultz Refrigerated Service, supra*, it was held by the Board to constitute a violation of § 8(b)(4)(A). Prior cases were distinguished on the ground, primarily, that in them, unlike in *Washington Coca Cola*, the primary employer had no permanent place of business at which the union could adequately publicize its dispute.

The rationale underlying this new limitation on neutral premises picketing was not immediately clear. What came to be known as the "*Washington Coca Cola* doctrine," however, was articulated in a series of Board decisions over the following seven or eight years. In *Int'l Brotherhood of Teamsters, Local 659 (Ready Mixed Concrete Co.)*, 116 N. L. R. B. 461 (1956), the Board found a violation of § 8(b)(4)(A) on facts closely similar to those in *Washington Coca Cola*. The Trial Examiner had stated, with the approval of the Board, that:

" . . . the Board in ambulatory situs situations, such as exist generally in the transportation industry . . . has in effect added to the four expressed in *Moore Drydock*, a fifth condition and one that the Respondents' picketing . . . fails to satisfy. That fifth condition is substantially this: that such picketing at neutral premises (as of trucks of a primary employer while making deliveries to customers) will not be regarded as privileged primary picketing absent a showing that the primary employer has in the vicinity no permanent establishment that may be picketed effectively. *Washington Coca Cola Bottling Works, Inc.* . . . "

Int'l Brotherhood of Teamsters, Local 659 (Ready Mixed Concrete Co.), 116 N. L. R. B. 461, 473 (1956).

The reason behind this fifth condition was stated by the Examiner as follows:

"Where, as in the *Schultz Refrigerated Service* case, *supra*, a primary employer has no fixed location—

in the vicinity where its employees may adequately be reached by picketing, then due regard for the right of the union to picket effectively . . . provides sufficient justification for permitting picketing of the primary employer at the location where the traveling work situs comes to rest, and any involvement of neutral employers and their employees may then appropriately be viewed as but a necessary incidental effect of lawful primary action . . . But where, as here, the employer has a fixed place of business in the area of the dispute at which its employees can be and are approached with the identical message the Union would deliver to the same employees at the premises of the secondary employers, the scales tip the other way. For now, the only detriment the Union would suffer by forbidding extension of its picketing to customers' job sites while deliveries are being made would be the foreclosure of what otherwise would be an added opportunity to enlist the aid of others not directly concerned with its dispute." *Id.* at 474.

Although the *Washington Coca Cola* doctrine was first articulated in ambulatory situs cases, its rationale was extended to all cases threatening involvement of neutral employers and their employees. Thus, in *Retail Fruit and Vegetable Clerks Union, Local 1017 (Crystal Palace Market)*, 116 N. L. R. B. 858 (1956), the employer with whom the union was involved in a dispute owned a large market hall and operated several stands therein, leasing the remaining stands to neutral third parties. When a strike was called against the primary employer, the union was given permission to picket at the particular stands operated by him, but chose, rather, to picket at several general entrances to the market hall. In holding these activities outside the standards established for common situs picketing, and thus violative of § 8(b)(4), the Board stated: "In developing and applying these standards, the controlling consideration has been to require that the picketing be so conducted as to minimize its impact on neutral employers insofar as this can be done without substantial impairment of the effec-

tiveness of the picketing in reaching the primary employees." Id. at 859 (emphasis in original).

The principle underlying *Washington Coca Cola* was extended to reach picketing of the premises of a primary employer even when the premises did not harbor neutral [fol. 405] employers or their employees. In *Chauffeurs, Teamsters and Helpers Local 175 (McJunkin Corp.)*, 128 N.L.R.B. 522 (1960), members of the striking union had picketed only one of ten entrances to the plant of the primary employer, that being a trucking entrance not normally used by employees of the plant. The Board held that action to be violative of § 8(b)(4) when combined with (1) the sending of "hot cargo" letters to neutral carriers with whom the primary employer dealt, and (2) one direct approach to neutral employees at their place of work requesting that they not handle the goods of the primary employer:

"Where a union * * * sets out on a concerted effort to keep neutral employers from doing business with the primary employer by encouraging and inducing the employees of those neutral employers, 'it would be manifestly unrealistic not to take into consideration the total pattern of conduct' engaged in by the union when passing upon particular incidents of inducement. If the totality of the union's effort is intended to accomplish a proscribed objective by inducements of secondary employees, then each particular inducement, being a component part of that total effort, must be adjudged as unlawful. 128 N.L.R.B. at 525." (Footnotes omitted.)

The pattern thus becomes clear.

A. The roots of the *Washington Coca Cola* doctrine lay in the Supreme Court's insistence that the gravamen of any complaint under § 8(b)(4) is a union's pursuit of a forbidden objective.

B. The legitimate objectives of primary strike or picketing activity were identified. These were repeatedly stated to be "reaching the primary employees," *Crystal Palace Market, supra* at 859, "publiciz[ing] its labor dispute in a

[fol. 406] traditional way among employees primarily interested," *Ready Mixed Concrete Co., supra* at 474, "communicat[ing] to employees of the primary employer its picketing message," *Ibid.**

C. Involvement of the employees of neutral employers was permissible only if merely incidental to the pursuit of a legitimate primary objective.

D. Most important, the doctrine required that picketing be conducted in such a manner and at such a place as to minimize its impact on neutral employees insofar as this could be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees. Actions beyond that minimum were to be interpreted as a pursuit of objectives forbidden by the Act and thus violative of its provisions.

The relevance of these principles to the issue before us is clear. In picketing the railroad right of way adjacent to the Carrier plant, the union was not furthering its legitimate objective of publicizing its dispute to Carrier employees. Eight gates on the employer's premises existed, and were picketed, for this purpose. Carrier employees were not permitted access to the plant through the gate on the railroad right of way. In picketing on the railroad right of way the union demonstrated that its manifest, and sole, objective was to induce or to encourage railroad [fol. 407] employees, or to coerce the railroad, to refuse to handle Carrier goods or otherwise to deal with the primary employer. Such results, although permissible when merely incidental to the pursuit of legitimate objectives, *Di Giorgio*

* It is obvious that some strike or picketing objectives lie fully outside the language of the section, which applies only to coercion of persons "engaged in commerce" or to inducement to "employees" in the course of their employment. It has been held, therefore, that union attempts to publicize a dispute to the general consuming public or directly to employers themselves (where the attempts are peacefully carried out) are immune from the proscriptions of the Act. *NLRB v. Business Machines & Office Appliance Mechanics, Local 459*, 228 F. 2d 553 (2 Cir., 1955), cert. denied, 351 U. S. 553; *Rabbowin v. NLRB*, 195 F. 2d 906 (2 Cir., 1952); *Crowley's Milk Company, Inc.*, 102 N. L. R. B. 996 (1953).

Fruit Corp. v. NLRB, 191 F. 2d 642 (D. C. Cir., 1951), here involved no such redemptive feature. The actions of the union were thus in violation of §§ 8(b)(4)(i) and (ii) (B) of the Act.

III

Where the picketing of neutral or secondary premises has been at issue, the courts of appeals have repeatedly ruled in a manner consistent with the principles set forth above. See, e.g., *NLRB v. United Steelworkers of America, Local 5246*, 250 F. 2d 184 (1 Cir., 1957); *NLRB v. General Drivers, Salesmen, Warehousemen & Helpers, Local 984*, 251 F. 2d 494 (6 Cir., 1958); *Brewery Drivers Union v. NLRB*, 220 F. 2d 380 (D. C. Cir., 1955); *NLRB v. Associated Musicians, Local 802*, 226 F. 2d 900 (2 Cir., 1955).

In *Seafarers International Union v. NLRB*, 265 F. 2d 585 (D. C. Cir., 1959), however, the Court of Appeals for the District of Columbia Circuit denied enforcement of an order of the Board which was clearly required by these principles. The union's dispute in that case was with Salt Dome, the operator of a ship used in offshore oil drilling in the Louisiana tidelands of the Gulf of Mexico. When the ship was taken to the neutral Todd shipyard for overhaul and repair, members of the union began picketing outside the shipyard gates. (They had been denied the right to picket on the wharf immediately alongside the vessel.) Two days after the picketing began, Salt Dome removed all its non-supervisory employees from the ship; the picketing continued, however, for more than a week thereafter. As a result of this activity employees of the Todd shipyard refused to work on the Salt Dome [fol. 408] vessel although they continued with other work about the yard. The Board ruled that by picketing after the removal from the ship of all Salt Dome's non-supervisory employees, the union revealed that its actions were directed not to fellow employees of Salt Dome, but to the neutral employees of Todd.

In reversing the Board's finding of a § 8(b)(4) violation upon these facts, the Court agreed that "the question is the objective. In the case at bar, if the objective of the

strike encompassed Salt Dome only, it was legal. If its objective was partly Todd or its employees, it was illegal. The difference is in whether the effect on Todd's workers was an objective of the strike or was merely an incident of it" 265 F. 2d at 590. The court introduced a new test, however, for determining, in the absence of admissions by the union of an illegal intent, the objectives of picketing elsewhere than on the primary's employer's premises:

"Here Todd, the unoffending employer, bore no more adverse effects than it would have suffered had it been working on the Pelican [Salt Dome's ship] at a dock owned by Salt Dome several miles away and had the picketing been at that dock. If such had been the case, Todd's employees would have refused to cross the line in order to work on the Pelican * * *. Such picketing would undoubtedly have been legal. *Since the picketing in the case at bar cast upon Todd no greater adverse effect than would thus have been the case*, its interest in preventing the picketing was not as great as the employees' interest in picketing what was the situs of the dispute.'" *Id.* at 592. (Emphasis added.)

" * * * Todd was under economic pressure * * *. But this pressure was the same sort as that felt by an employer when one of his major suppliers or [fol. 409] customers is being picketed, or that which a contractor feels when a subcontractor is struck at a crucial point in construction." *Id.* at 591.

As we read the dissenting opinion, our colleague relies upon this same argument in the case before us. "It is * * * clear from the record that the picketing employees made no attempt to interfere with any of the railroad's operations for plants other than Carrier. The railroad employees were not encouraged to, nor did they, refuse to serve the other plants. The picketing was designed to accomplish no more than picketing outside one of Carrier's own delivery entrances might have accomplished." To our minds, the crucial fallacy in this argument lies in the failure to distinguish between fully legitimate objectives of a union in picketing a primary employer's premises,

and those hoped-for results which are not permissible unless only incidentally achieved.

It is clear that where a union engages in traditional picketing activities on the premises of the employer with whom it has a dispute, its actions may lawfully have the effect of encouraging employees of neutral suppliers or customers not to enter the premises. *Di Giorgio Fruit Corp. v. NLRB*, 191 F. 2d 642 (D. C. Cir., 1951). The cases have uniformly held, however, that such attempts to influence neutral employees are lawful only if incidental to the independently legitimate objective of publicizing the union's dispute with the primary employer to the employees of that employer. After all, the language found in a statute is not wholly irrelevant to its proper construction. Because a harm may be permitted in one instance only because incidental to lawful activities, it is fallacious reasoning to hold that the same harm must be permitted in another instance where it is independently pursued. Neither logic nor the sense of the different economic situations indicates that such a result is justified. Insofar as the decision in [fol. 410] *Seafarers International Union v. NLRB*, *supra*, rests upon a line of reasoning we cannot accept, we find the case unpersuasive. Though the statute may permit economic harm to be suffered by a neutral when a union, in the progress of aggressively pursuing lawful objectives, incidentally occasions that harm, it does not follow that economic harm suffered by a neutral independently occasioned by aggressive union activity, is also permissible under that statute.

Finally, counsel for the Board place great reliance upon the recent decisions of the Supreme Court in *Local 761, International Union of Electrical, Radio & Machine Workers (General Electric Co.) v. NLRB*, 366 U. S. 667 (1961). There, as in the *Ryan* case, *supra*, the union had picketed several entrance gates to the plant of the primary employer. One of these gates was used exclusively by employees of independent contractors who were utilized to perform various tasks on the premises. Although remanding the case for further findings of fact by the Board, the Court held such picketing of a separate gate to be violative of § 8(b)(4) so long as the independent workers were "performing

tasks unconnected to the normal operations of the struck employer." *Id.* at 680. And see *United Steelworkers v. NLRB*, 289 F. 2d 591 (2 Cir. 1961).

The Court's holding in *General Electric* does not, of course, conflict with the result we here reach. In both cases union picketing activities are held to violate § 8(b)(4) of the Act because of their appeal to neutral employees. In *General Electric*, the picketing took place at the premises of the employer with whom the union was engaged in a dispute. The Supreme Court limited its finding of illegality, therefore, to circumstances in which the neutral employees were not engaged in work connected with the normal operations of the plant. In so limiting its holding the Court acknowledged the special solicitude of Congress and the Board that the statute not unduly restrict traditional picketing at the premises of the primary employer. *Local 761 (General Electric)*, *supra* at 679, 681.

In this case, however, the union activity occurred on the right of way of the New York Central Railroad. No special policy of greater latitude for picketing at the primary employer's premises thus comes into play, and no distinction based on the work performed by the neutral employees need be made.

We do not find in *General Electric* a policy of the Supreme Court to exempt from the Act's proscriptions all union attempts to keep deliveries from being made to a struck plant, wherever and however such attempts are made. Yet it is this position for which the Board now earnestly contends. Were we to accept such a doctrine, however, we should not be able to distinguish attempts to prevent deliveries from attempts directly to interfere with other business relations between the struck employer and his suppliers or customers. Congress might have written § 8(b)(4) to apply only to union interference with business relations between a struck employer's suppliers and customers and *their* suppliers and customers. It did not do so, nor have the courts failed to find violations of the Act where union activities directly interfered with relations between a struck employer and secondary parties dealing with him. See, e.g., *Local 1976, United Brotherhood of*

Carpenters (Sand Door & Plywood Co.) v. NLRB, 357 U. S. 93 (1958).

We do not read *Local 761 (General Electric Co.) v. NLRB*, *supra*, to conflict with our disposition of the case at bar.

The petition of Carrier Corporation is granted.

SWAN, Circuit Judge:

I concur in the result of Judge Waterman's opinion.

[fol. 412] LUMBARD, Chief Judge—Dissenting:

This case presents the question whether it is an unfair labor practice, prohibited by §§ 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, for a union to picket a railroad right of way adjacent to the employer's premises, while the railroad is engaged in normal delivery and removal operations in the behalf of the struck employer, if there is no point of entry into the latter's premises where the union can conduct such picketing. I would hold that picketing under such circumstances is not an unfair labor practice; accordingly, I dissent from the action of my colleagues in granting the employer's petition to modify the Board's order.

As I understand the cases in this area, the lawfulness of picketing depends on the legitimacy of the union's objective; the place where the picketing occurs is controlling only insofar as it sheds light on the union's objective. The legitimate objectives of picketing include publicizing a dispute to employees of neutral employers who are performing part of the everyday operations of the struck employer. Since the picketing which occurred here had that objective, and since there was no other place where the union could conduct such picketing, I agree with the National Labor Relations Board that there was no violation of the Act.

The railroad gate which was the locus of the disputed picketing affords access from Thompson Road, a public thoroughfare, to a right of way owned by the New York Central. The right of way is approximately thirty-five feet wide, and extends in an east-west direction along the southern boundary of the Carrier plant, which fronts on the

eastern side of Thompson Road. New York Central maintains railroad tracks on the right of way which by a series of spurs service Carrier and several adjacent plants also [fol. 413] east of Thompson Road. The gate was cut into a fence which surrounded the railroad's property on its southern boundary and was a continuation of a fence enclosing the Carrier plant along Thompson Road. It was padlocked when not open for railroad switching operations. Railroad personnel held the key to the gate, which could also be opened by a master key, held by Carrier employees, to locks on Carrier property.¹ Carrier employees were not permitted access to the Carrier plant through the gate and right of way.

During the early days of the strike, the railroad provided regular service to the other plants located along the right of way. On March 10, about one week after the strike had commenced, Carrier made arrangements with New York Central for it to "spot" fourteen empty boxcars at the Carrier plant and remove the same number of loaded cars on the following day. On March 11, after the regular train crew had completed switching operations for other plants, supervisory personnel of the railroad who were willing to disregard the picket line took over the running of the train and started to perform the Carrier operations, which necessitated several switching maneuvers through the Thompson Road gate and onto Thompson Road. In the course of these operations, the striking Carrier employees congregated on Thompson Road outside the railroad gate, threatened railroad personnel running the train, and obstructed its passage by standing or lying in front of it and driving an automobile onto the track. These are the acts which Carrier claims were violations of §§ 8(b)(4)(i) and (ii)(B).

Section 8(b)(4) of the N.L.R.A., as amended by 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4), makes it an unfair labor practice for a union

[fol. 414] "(i) to engage in, or to induce or encourage any individual employed by any person engaged in

¹ The right of way had been owned by Carrier, which deeded it to New York Central in 1949.

commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce; where in either case an object thereof is—

. . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .”

It is evident that the acts complained of are covered by the terms of clauses (i) and (ii). It is equally plain that the objective of the striking Carrier employees was to prevent the railroad from performing its usual services for Carrier. However, the acts constituted “primary picketing” which is protected by the proviso in clause (B).

That primary picketing is not an unfair labor practice was first made explicit in the N.L.R.A. by the 1959 amendments to that Act. Before that time, § 8(b)(4)(A), the predecessor of the present provisions, if construed literally would have prohibited much picketing that lay within the domain of traditional union economic warfare. To avoid that result, unintended by Congress, § 8(b)(4)(A) was held to prohibit only “secondary” activity directed at someone [fol. 415] other than the employer with whom the union had a grievance. The incidental coercive effects felt by a neutral employer when his employees refuse to cross a picket line were declared outside the statutory prohibition. See *Oil Workers International Union (The Pure Oil Co.)*, 84 N.L.R.B. 315 (1949); *United Electrical, Radio & Machine Workers (Ryan Construction Corp.)*, 85 N.L.R.B. 417 (1949); *N.L.R.B. v. International Rice Milling Co., Inc.*,

341 U. S. 665; *N.L.R.B. v. Local 294, International Brotherhood of Teamsters*, 284 F. 2d 887 (2 Cir. 1960).

But although a distinction between primary and secondary picketing was drawn, no ready criteria for differentiating the two were available. The problem did not yield to a "quick, definitive formula," but rather required the development of standards "on the basis of accumulating experience." *Local 761, International Union of Electrical, Radio & Machine Workers v. N.L.R.B.*, 366 U. S. 667, 674 (1961). In the first cases, the touchstone of decision was ownership^a of the picketed premises. Picketing at a secondary employer's premises was held unlawful. *E.g.*, *United Brotherhood of Carpenters (Wadsworth Building Co.)*, 81 N.L.R.B. 802 (1949), enforced, 184 F. 2d 60 (10 Cir. 1950), cert. denied, 341 U. S. 947 (1951). Picketing at the primary employer's premises was allowed, even if it occurred at a gate reserved for the exclusive use of employees of a neutral contractor doing construction work on the premises. *Ryan Construction Corp., supra*. In *Ryan*, the Board said: "When picketing is wholly at the premises of the employer with whom the union is engaged [fol. 416] in a labor dispute, it cannot be called 'secondary'. . . ." *Id.* at 418. See also *The Pure Oil Co., supra*.

This simple ownership test of union objective proved too inflexible. Situations arose in which due regard for the union's right to use its traditional weapons, including the inducement of neutral employees to support a strike by respecting picket lines, required that picketing be permitted elsewhere than at the primary employer's premises. In *International Brotherhood of Teamsters (Schultz Refrigerated Service, Inc.)*, 87 N.L.R.B. 502 (1949), the Board ruled that truckdriver employees could picket the primary employer's trucks when replacement drivers were loading or unloading them on or in front of customer's premises. In the Board's view, such picketing was primary activity because "in view of the roving nature of its business, [this was] the only effective means of bringing direct pressure

^a "Ownership" in this context, here and elsewhere in the opinion, refers not only to absolute legal title, but also to the occupation of premises through some legal right less than absolute ownership.

on" the employer. Id. at 506. The employees were "acting in a manner traditional to employees in all other industries, who choose to stand before their place of employment and point out their replacements to the interested public as strikebreakers, and their employer as unfair." Id. at 507. In *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547 (1950), the Board upheld picketing of a neutral employer's shipyard where the struck employer's ship was undergoing construction work, the union having requested and been refused permission to place pickets at the dock where the primary employer's ship was berthed. At the same time, in order to protect "the right of a secondary employer to be free from picketing in a controversy in which it is not directly involved," the Board laid down standards to be applied in these "common situs" cases. Id. at 549. The effect of these standards was to confine the picketing as narrowly as possible to the normal operations [fol. 417] of the primary employer and to require the union to make plain that it had no dispute with the neutral employer.*

* Picketing the premises of a secondary employer was declared to be "primary" if the following conditions were met: "(a) The picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer." *Moore Dry Dock*, *supra*, at 549. (Footnotes omitted.) Later Board decisions made explicit a further condition which, at least as a relevant factor, was implicit in the rationale which underlay the *Dry Dock* standards; it must be shown that there was no reasonable opportunity for the union to accomplish its lawful objectives by picketing the premises of the primary employer. See *Brewery & Beverage Drivers (Washington Coca Cola Bottling Works, Inc.)*, 107 N. L. R. B. 299 (1953), affirmed, 220 F. 2d 380 (D. C. Cir., 1955); *International Brotherhood of Teamsters (Ready Mixed Concrete Co.)*, 116 N. L. R. B. 461, 473 (1956). Still later, the Board declared that failure to meet this condition was not conclusive but was only "one circumstance among others, in determining an object of the picketing." *International Brotherhood of Electrical Workers (Plauche Electric, Inc.)*, 135 N. L. R. B. No. 41 (1962). See also *N.L.R.B. v. Local 294, International Brotherhood of Teamsters*, 284 F. 2d 887 (2 Cir., 1960).

By parity of reasoning it was held in other cases that the mere fact of ownership by the primary employer would not justify picketing which unreasonably interfered with the rights of neutral employers. In *Local 55 (PBM)*, 108 N.L.R.B. 363, enforced 218 F. 2d 226 (10 Cir. 1954), the Board found a violation of § 8(b)(4)(A) when a union picketed a construction site owned by a general contractor on which employees of neutral subcontractors were working, because the union did not make clear that its dispute was solely with the general contractor. The Board said: " . . . [T]he fact that the picketing takes place at the situs of the primary employer's regular place of business rather than at an ambulatory situs is not controlling; in both situations, picketing at a common situs is unlawful if the picketing sign fails to disclose that the dispute is confined [fol. 418] to the primary employer." *PBM, supra*, at 366. (Footnote omitted.) In *Retail Fruit & Vegetable Clerk's Union (Crystal Palace Market)*, 116 N.L.R.B. 856 (1956), enforced 249 F. 2d 591 (9 Cir. 1957), the Board stated explicitly that the standards developed in *Moore Dry Dock* for common situs cases applied without regard to the ownership of the premises. It said: "We can see no logical reason why the legality of such [common situs] picketing should depend on title to property. The impact on neutral employees of picketing which deviates from the standards outlined above is the same whether the common premises are owned by their own employer or by the primary employer." *Crystal Palace Market, supra*, at 859.

A related development was the reversal of the rule announced in *Ryan, supra*, pertaining to separate gate cases. In *Crystal Palace Market*, the Board overruled *Ryan* to the extent that it was inconsistent with the later case. *Id.* Thereafter, in *United Steelworkers v. N.L.R.B.*, 289 F. 2d 591 (2 Cir. 1961), we granted enforcement of a Board order finding a violation of § 8(b)(4)(A) in the picketing of a separate gate to the primary employer's premises, which gate was used exclusively by employees of neutral contractors doing construction work. The conditions which justified the finding of a violation were stated:

"There must be a separate gate marked and set apart from other gates; the work done by the men

who use the gate must be unrelated to the normal operations of the employer and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations." *Id.* at 595.

This development of the distinction between primary and secondary picketing was reviewed and approved by the [fol. 419] Supreme Court in *Local 761, International Union of Electrical, Radio & Machine Workers v. N. L. R. B.*, 366 U. S. 667 (1961), a separate gate case similar to *United Steelworkers v. N. L. R. B.*, *supra*. General Electric maintained a separate gate to its premises for the use of employees of independent contractors doing a variety of tasks including construction and maintenance work. During a strike against General Electric, pickets were placed at this gate as well as other plant entrances. The Board held that by picketing a gate used only by employees of neutral employers, the union had violated § 8(b)(4)(A). The Supreme Court approved the tests laid down in *United Steelworkers*, and remanded the case to the Board for a determination whether the workers using the gate "performed conventional maintenance work necessary to the normal operations of General Electric." *Local 761, supra*, at 682.

In reaching its decision, the Court noted that its holding "would not bar the union from picketing at all gates used by the employees, suppliers, and customers of the struck employer." *Id.* at 680. The Court said:

"The Union claims that, if the Board's ruling is upheld, employers will be free to erect separate gates for deliveries, customers, and replacement workers which will be immunized from picketing. This fear is baseless. The key to the problem is found in the type of work that is being performed by those who use the separate gate. It is significant that the Board has since applied its rationale, first stated in the present case, only to situations where the independent workers were performing tasks unconnected to the normal operations of the struck employer—usually construction work on his buildings.

In such situations, the indicated limitations on picketing activity respect the balance of competing interests that Congress has required the Board to enforce. On the other hand, if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations." (Footnote omitted.) *Id.* at 680-81.

The pattern which emerges from these cases requires affirmation of the Board's ruling. It is true that none of them precisely anticipates the facts here. This case does not involve a common situs, since none of Carrier's employees worked on the New York Central premises. But so long as the picketing is strictly confined to the objectives which justify picketing a neutral employer's premises in common situs cases and involves no greater interference with the neutral employer than is involved there, I see no reason why the picketing should be labelled "primary" in one case and not in the other. Where there is not a common situs, the picketing is not necessary to publicize the dispute to the employees of the primary employer. But as the Supreme Court explicitly recognized in *Local 761*, it is as legitimate a union objective to publicize the dispute to neutral employees making deliveries and performing other ordinary services for the primary employer as it is to publicize it to his own employees. Nor is this the case hypothesized by the Supreme Court in *Local 761*, where the primary employer has established a separate delivery gate leading onto his own premises. But the controlling issue being always whether the union's objective was one within the traditional scope of primary picketing, I see no more reason to accept as conclusive an ownership test when it works against the union than when it works in its favor, if other facts point to a contrary result.

[fol. 421] The majority's decision rests on the premise that the only lawful objective of picketing is to reach the employees of the primary employer. I am totally unable to square this with the Supreme Court's statement in *Local 761*, *supra*, that "appealing to neutral employees whose

tasks aid the employer's everyday operations" is "traditional primary activity." *Id.* at 681. The majority denies that there is a conflict, saying that "in both cases union picketing activities are held to violate § 8(b)(4) of the Act because of their appeal to neutral employees." But the Supreme Court stated, again explicitly, that the picketing was not unlawful if, as here, it reached neutral employees who performed work "necessary to the normal operations" of the employer. *Id.* at 682.

The sole basis of distinguishing this case is that the gate involved here did not lead immediately to the primary employer's premises. Nowhere in the opinion in *Local 761* can I find the "special solicitude" for picketing the premises of a primary employer which the majority finds, except insofar as the location of the picketing indicates its motive. So far as I can see, the majority's distinction between "fully legitimate objectives of a union in picketing a primary employer's premises, and those hoped-for results which are not permissible unless only incidentally achieved" is one of those "finely spun factual distinctions having no basis in legislative history or in reason" which the majority condemns. What the alleged distinction comes down to is that the union can seek to influence neutral employees at the premises of the primary employer and not elsewhere (which in this case means, of course, that it cannot use pickets to influence the railroad workers at all). But this makes the test not the union's objective but the location of the picketing, a test which the majority itself admits to be obsolete.

[fol. 422] Of course the question of ownership will usually be of great significance. Legitimate union objectives can ordinarily be accomplished by picketing around the employer's premises. Such picketing is usually the most direct and a sufficient means of publicizing the union's grievance to customers and suppliers and their employees, who can then, if they choose, respect the picket line and support the union's cause. Ordinarily, therefore, if the union extends its pickets to other premises, there is a reasonable basis for the inference that the union has attempted more elaborate methods of interference with neutral employers and has sought to embroil them in a dispute not their own. But just as the facts of a particular case may be such that

even picketing solely around the primary employer's premises does not conclusively demonstrate that the union has stayed within bounds, so there may be cases where picketing elsewhere does not justify the inference that the union has gone too far.

In this case, it is undisputed that the railroad's operations for Carrier were in furtherance of Carrier's normal business. It is equally clear from the record that the picketing employees made no attempt to interfere with any of the railroad's operations for plants other than Carrier. The railroad employees were not encouraged to, nor did they, refuse to serve the other plants. The picketing was designed to accomplish no more than picketing outside one of Carrier's own delivery entrances might have accomplished. Because the fence surrounding the railroad's right of way was a continuation of the fence surrounding the Carrier plant, there was no other place where the union could have brought home to the railroad workers servicing Carrier its dispute with Carrier. This fact serves to distinguish the present case from those where a union, able to picket at company entrances, would commit an unfair labor practice if it were to picket the home bases of delivery services.

[fol. 423] . Carrier argues that it is inappropriate in this case to work a balance of interests between the union's right to engage in primary picketing and the neutral employer's right to be free of interference, because the picketing of the railroad gate was attended by threats and coercion of railroad personnel. Such conduct, it is urged, is prohibited in any event. But this misconceives the point at which the balance of interests becomes relevant. The proviso which protects primary activities relates to the prohibited objectives of clause (B). This makes plain that the distinction between primary and secondary picketing is based, as it was in cases arising under the statute prior to the 1959 amendment, on a consideration of the union's objectives. If further demonstration were needed, the legislative history of the 1959 amendments clearly indicates congressional approval of the earlier cases. See H. R. Rep. No. 741, 86th Cong., 1st Sess. 21 (1959); H. R. Rep. No. 1147, 86th Cong., 1st Sess. 38 (1959); 105 Cong. Rec. 16588-89 (Aug. 20, 1959) (analysis of Sen. Kennedy and Rep. Thompson). It is this distinction, not a distinction between peaceful and

violent means, which adjusts the conflicting interests of the union and neutral employers for purposes of § 8(b)(4). If the union's objectives are within the ambit of primary picketing, there is no violation of § 8(b)(4) whatever the means employed. Some other provision of the act may, of course, be violated, as was the case here.* [fol. 424] Finally, it is urged that to uphold the union's activity in this case would thwart congressional intent in the 1959 amendments to extend the protection against secondary boycotts to railroads and their employees. Such protection was intended to be given. See 105 Cong. Rec. 16589 (Aug. 20, 1959) (analysis of Sen. Kennedy and Rep. Thompson); 105 Cong. Rec. 18022 (Sept. 3, 1959) (analysis of conference agreement by Rep. Griffin). But nothing in the statute or its history indicates an intent to give railroads greater protection in this regard than other employers because of their status as common carriers or for any other reason. The Board's order legitimates only that picketing directed at railroad operations which service the normal business of the primary employer; it does not legitimate all picketing of a railroad right of way located adjacent or near to the premises of a primary employer.

It would deny Carrier's petition to modify the Board's order.

* In another portion of the case, the Board found that the union had violated § 8(b)(1)(A) of the N. L. R. A., 29 U. S. C. § 158 (b)(1)(A), "by the use of threats and physical force against employees of the Carrier Corporation, by obstructing, blocking and preventing the ingress and egress of Carrier employees at entrances to the Carrier plant, by obstructing the ingress and egress of New York Central Railroad Company personnel in the presence of Carrier employees, and by assaulting peace officers in the presence of Carrier employees." The Board issued an appropriate order and an uncontested decree of enforcement had been entered.

Pending the Board's determination, the Regional Director of the N. L. R. B. obtained temporary injunctive relief against picketing of the railroad's premises. *Ramsay v. Local 5895, United Steelworkers of America*, 40 (CCH) Labor Cases 70, 275 (N. D. N. Y. April 16, 1960). The union was also subject to an injunction issued in state court proceedings which, inter alia, limited the places and extent of picketing and enjoined violent or disorderly conduct. *Carrier Corp. v. Brewster*, order entered in the Supreme Court of Onondaga County, April 12, 1960.

[fol. 425]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon.
Thomas W. Swan, Hon. Sterry R. Waterman, Circuit
Judges.

CARRIER CORPORATION, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

JUDGMENT—October 18, 1962

A petition for review of an order of the National Labor
Relations Board,

This cause came on to be heard on a petition for review,
and was argued by counsel.

On consideration whereof, it is now hereby ordered, ad-
judged and decreed that the petition for review be and it
hereby is granted in accordance with the opinion of this
court.

A. Daniel Fusaro, Clerk.

[fol. 426]

[File endorsement omitted]

[fol. 427]

[File endorsement omitted]

[fol. 428]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 27079

[Title omitted]

INTERVENORS' PETITION FOR REHEARING AND PETITION FOR
REHEARING EN BANC—Filed November 1, 1962

Pursuant to Rule 25 of the Rules of this Court, the
United Steelworkers of America, AFL-CIO, and its Local
Union 5895, Intervenor, respectfully petition for a rehear-

ing of this case, and suggest that such rehearing be en banc. As grounds therefor, the intervenors state the following:

I—The Decision Herein Is in Direct Conflict With a Recent Decision of the Supreme Court and a Recent Decision of This Court.

The question presented in this case, as correctly stated by Judge Waterman's opinion, is "whether it is a violation of §§ 8(b)(4)(i) and of (ii)(B) [of the National Labor Relations Act] for a union to picket a railroad right of way adjacent to the employer's premises, when it is the manifest objective of such picketing to prevent employees of the rail- [fol. 429] road from handling the goods of the struck employer in the course of regular delivery and removal operations." The decision of this Court holding that the answer to that question is in the affirmative is in direct conflict with the decision of the Supreme Court in *Local 761, IUE v. NLRB*, 366 U. S. 667 (1961), as well as the decision of this Court in *United Steelworkers v. NLRB*, 289 F. 2d 591 (1961), which the Supreme Court in *Local 761* approved and adopted.

In order fully to understand the meaning of those decisions it is necessary to understand the development of the law which preceded them. As Judge Waterman's opinion observes, that history can be conveniently divided into two periods: 1947 to 1952; and 1952 to 1961.

During the first period, the Board developed two important doctrines which bear on the issues in this case. The first was that, notwithstanding the literal language of the statute, Congress did not intend to prohibit any of the traditional types of conduct engaged in by unions in connection with primary strikes. These included, the Board held, not only the inducement of employees of the struck employer not to work, but also the inducement of employees of other employers not to perform work at the site of the primary dispute. Accordingly, the Board held in a series of cases that it was not an unfair labor practice for a union, in connection with a lawful strike, to induce employees of other employers—by picketing, by letter, by oral appeal or any other peaceful means—not to enter or work at the premises

of the struck employer. E.g., *Oil Workers Int'l Union (Pure Oil Co.)*, 84 N.L.R.B. 315 (1949); *Newspaper Deliverers Union (Interborough News Co.)*, 90 N.L.R.B. 2135 (1950); *United Elec. Workers (Ryan Constr. Co.)*, 85 N.L.R.B. 417 (1949); *International Brotherhood of Teamsters (DiGiorgio Fruit Corp.)*, 87 N.L.R.B. 720 (1949), *affirmed*, 191 F. 2d 642 (D. C. Cir. 1951), *cert. denied*, 342 U. S. 869 (1951).

The second important rule developed in the 1947-52 period is the so-called "common situs" doctrine. This was [fol. 430] the Board's effort to reconcile the right of a striking union to attempt to keep all persons away from the site of the primary dispute with the right of neutral employers to be free of interference at their own premises, in situations where the struck employer shared a "common situs" with one or more other employers. The case in which the Board first announced its common situs rules, *Sailor's Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547 (1950), illustrates the problem well. In that case, the primary strike was against a ship, which happened to be tied up at a dock owned by another employer, Moore. If the union were permitted to picket the dock without restrictions, the effect might well be to induce Moore employees not only to refrain from performing work on the struck ship, but generally to refrain from all work at the dock, including work having nothing to do with the struck ship. To avoid this result, the Board held that picketing in such situations must be limited in the following ways: (1) It must take place only at times when the situs of the dispute is located on the secondary employer's premises, (2) it must take place only when the primary employer is engaged in its normal business at the common situs, (3) the picketing must be reasonably close to the location of the situs of the dispute, and (4) the picket signs must make clear that the dispute is with the primary employer only.

The Board reaffirmed in *Moore Dry Dock* that "picketing at the premises of a primary employer is traditionally recognized as primary action [and therefore not a violation of the Act] even though it is 'necessarily designed to induce and encourage third persons to cease doing business with the picketed employer.'" Thus, the common situs rules were not an attempt to modify the holding of the cases cited

above, but rather to adapt the basic principle established by those cases to the common situs situation. As the Board pointed out:

[I]f Samsock, the owner of the S.S. Phopho, had [fol. 431] had a dock of its own in California to which the Phopho had been tied up while undergoing conversion by Moore Dry Dock employees, picketing by the Respondent at the dock site would unquestionably have constituted primary action, even though the Respondent might have expected that the picketing would be more effective in persuading Moore employees not to work on the ship than to persuade the seamen aboard the Phopho to quit the vessel. The difficulty in the present case arises, therefore, not because of any difference in the picketing objectives, but from the fact that the Phopho was not tied up at its own dock, but at that of Moore, while the picketing was going on in front of the Moore premises." 92 N.L.R.B. at 548-49.

It is therefore clear that, prior to 1952, the inducement of employees of other employers not to work at the site of a primary dispute was deemed to be a perfectly legitimate activity which Congress had not intended to prohibit, not simply something which the law tolerated as an unavoidable consequence of a picket line at the site of the dispute. The Board's view was that the Act prohibited a striking union from inducing employees of neutral employers to engage in work stoppages away from the site of the primary dispute, but that it permitted the union to attempt to cause a total interruption of work, by all persons, at the site of the primary dispute. Thus in *Pure Oil* the union was permitted not only to appeal to secondary employees by picketing at the struck site, but also by sending letters to such employees asking them not to work at the struck site. In *Interborough* the striking union was permitted to make personal appeals to secondary employees away from the site of the dispute, asking them not to make deliveries to the struck newsstands. In *Ryan*, the picketing in question took place at a gate used solely by secondary employees. In *Di-Giorgio*, the union imposed disciplinary sanctions on em-

employees of the employer who entered the struck premises. [fol. 432] At the heart of these decisions was the concept that a primary strike is not merely a concerted refusal to work by the employees of the struck employer, but is rather an attempt, through peaceful persuasion and appeal to labor solidarity, to impose a complete cessation of work by all employees at the struck establishment. While Section 8(b)(4) was designed to protect "neutral" employers from strike action directed against them, the Board held that it was not designed to protect them from these normal incidents of a strike directed against a primary employer.

Judge Waterman's opinion in the present case recognizes that this was the approach of the Board's early decisions, but expresses the view that it was not followed in three cases which ultimately reached the Supreme Court in 1951. *NLRB v. Denver Building Trades Council*, 341 U. S. 675; *International Brotherhood of Elec. Workers v. NLRB*, 341 U. S. 694; *Local 74, United Brotherhood of Carpenters v. NLRB*, 341 U. S. 707. Each of these cases involved essentially similar circumstances: A union, which objected to the presence on a construction job of a contractor whose employees were nonunion, picketed the entire project in an effort to induce the employees of all the contractors working on the project to strike, in order to pressure the general contractor into cancelling his contract with the nonunion contractor. The Board and the Supreme Court both held this conduct to be violative of the statute.

We find no inconsistency between these decisions and the cases to which we have referred above. While unions have always felt that all the contractors engaged in a single construction project should be treated as a single employer, once it was determined that they are not to be so treated the result reached in those cases followed easily. The union's primary dispute in each instance was with the nonunion contractor. Yet the picketing was against the entire project, and was designed to cause a complete stoppage of work by all the employees of all the contractors. The *Maore Dry* [fol. 433] *Dock* rules were not followed, although Judge Waterman erroneously states that they were. The picket signs in each case stated that the "job," not simply the offending contractor, was unfair. The picketing was thus

directed against all of the employers at the site. This was a true secondary boycott—an effort to bring pressure on the primary employer by striking other employers with whom the primary employer did business.

One other case in this period requires mention, *NLRB v. International Rice Milling Co.*, 341 U. S. 665 (1951). In that case the union, while picketing the primary employer, induced two employees of another employer not to drive their truck across the picket line. The Board, following *Pure Oil*, had held that this was legitimate primary conduct. The Fifth Circuit had reversed the Board, holding that "these activities became secondary when the strikers attempted to induce and encourage the employees of this neutral employer. . . . The fact that they occurred near the struck employer's plant is not enough to draw such a distinction as the Board attempts to draw . . ." 183 F. 2d 21, 26. The Supreme Court reversed the Fifth Circuit and upheld the Board.

As Judge Waterman noted in his opinion, the Supreme Court adopted a rationale somewhat different than that of the Board. However, the Court also pointed out that the statute was intended only to outlaw secondary boycotts, not primary strikes, and therefore must be interpreted in a manner consistent with that purpose. 341 U. S. 672-74. Accordingly, the decision has been generally interpreted as upholding the approach taken by the Board.

In any event, as we shall see, any doubts which might be raised by *Rice Milling* were laid to rest in *Local 761*. The point we wish to emphasize here is that, under the Board decisions as they existed prior to 1952, there could be no question that the union's conduct in the present case would not have been deemed an unfair labor practice. Since, the [fol. 434] union induced employees of the railroad only to refuse to make deliveries or pickups at the struck plant, and did not interfere with the railroad's operations in any other way, the picketing in this case would plainly have been considered "primary" and protected prior to 1952.

After 1952, the personnel of the Board began to change, and so did its decisions. Slowly but surely, the Board developed the notion that a striking union must limit its appeal only to employees of the struck employer, and that any

effort to induce any stoppage of work by employees of other employers is unlawful unless it is an unavoidable side effect of an appeal to the primary employees.

This notion appears to have been derived originally from a mistaken interpretation of *Moore Dry Dock* and the other common situs cases. It was first hinted at in *Brewery and Beverage Drivers (Washington Coca Cola Bottling Works, Inc.)*, 107 N.L.R.B. 299 (1953). In that case, the Board held broadly that a union on strike against a Coca Cola bottling plant could not picket the trucks which were owned by the employer and which made deliveries to the retail stores, because the union had adequate opportunity to picket at the plant itself. The Board distinguished *Moore Dry Dock* on the ground that in that case there was no place, other than the common situs, where the striking union could picket.

On the facts of the case, which do not concern us here, the result reached might have been correct. What is significant for present purposes is that the Board did not even inquire whether the union's picketing might have been permissible in order to appeal to secondary employees not to unload the truck, or not to provide it with gasoline or other service. The Board's unstated assumption was that the only permissible object of picketing is to appeal to primary employees and consumers, and if that can be done at the plant site there is no justification for picketing the trucks.

This unstated assumption became explicit in later cases, [fol. 435] as Judge Waterman's opinion demonstrates. In *Retail Fruit and Vegetable Clerks Union (Crystal Palace Market)*, 116 N.L.R.B. 858, 859 (1956), it was stated clearly: "In developing and applying these [common situs] standards, the controlling consideration has been to require that the picketing be so conducted as to minimize its impact on neutral employers insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees." (Emphasis in original).

Having adopted the rule that picketing is lawful only so long as it appeals to primary employees, there was no reason to limit its applicability to common situs situations. Soon the Board began to rule that even picketing at the

primary employer's own premises is unlawful if it is designed exclusively to appeal to employees of other employers. *Chauffeurs, Teamsters and Helpers Local 175 (McJunkin Corp.)*, 128 N.L.R.B. 522 (1960) (picketing at entrance to struck site used solely by trucks operated by employees of other employers is unlawful). It was not altogether surprising that before long a new phenomenon began to appear on the labor relations scene: "the reserved gate." Employers, seeing the implications of the new doctrine, began to set aside special gates for the use of employees of other employers while their own employees were on strike. The Board, in a series of cases which includes *Local 761* and *United Steelworkers*, held that in those circumstances the striking union could not picket those gates.

It should be noted at this point that this entire line of Board decisions did not fare well in the Courts. Judge Waterman's opinion overlooks the fact that the D. C. Circuit did not approve the Board's *Washington Coca Cola* doctrine, although it did find that the result reached in that case was correct. *Brewery and Beverage Drivers v. NLRB*, 220 F. 2d 380.

Indeed, *Washington Coca Cola* was criticized so often in [fol. 436] the courts, including this Court,¹ that the Board itself finally overruled it. *Local 861, IBEW (Plauche Electric Inc.)*, 135 N.L.R.B. No. 41, 49 L.R.R.M. 1446 (Jan. 12, 1962). Judge Waterman also seems to have overlooked the fact that the *McJunkin* decision was similarly disapproved by the D. C. Circuit, which refused to enforce it in *Chauffeurs, Teamsters and Helpers v. N.L.R.B.*, 294 F. 2d 261 (1961). See also *Local 618, Automotive Employees v. NLRB*, 249 F. 2d 332 (8th Cir. 1957) (reversing Board decision holding that picketing at part of struck employer's premises where only secondary employees were working was unlawful). Thus, the law throughout this period was in a state of confusion.

¹ *NLRB v. Local 294, International Brotherhood of Teamsters*, 284 F. 2d 887, 891 (2d Cir. 1960); *Sales Drivers v. NLRB*, 229 F. 2d 514 (D. C. Cir. 1955), cert. denied, 351 U. S. 972 (1955); *NLRB v. General Drivers*, 225 F. 2d 205 (5th Cir. 1955), cert. denied, 350 U. S. 914 (1955).

It is against this background that this Court's decision in *United Steelworkers v. NLRB*, 289 F. 2d 591 (1961) and the Supreme Court's decision in *Local 761, IUE v. NLRB*, 366 U. S. 667 (1961) must be read. In both of those cases, the Board had held broadly that a union on strike at an industrial plant could not picket a gate to that plant which was reserved exclusively for employees of other employers. In *United Steelworkers*, this Court sustained the result reached by the Board, but on a much narrower ground. Such picketing, the Court held, is unlawful only if "the work done by the men who use the gate" is "unrelated to the normal operations of the plant" and is work which would not, "if done when the plant were engaged in regular operations, necessitate curtailing those operations." *Id.* at 595.

This Court thus recognized that the purpose of a primary strike is to stop the employer's normal operations, and that to do this it is necessary to appeal to employees of other employers, who perform work at the struck premises which [fol. 437] is related to the normal operations, to stay away for the duration of the strike. On the other hand, the court held, when employees of other employers perform work which is unrelated to the struck employer's normal operations, it is not necessary for a union to interfere with that work in order to make its strike effective, and therefore the neutral employer ought to be protected.

The Supreme Court, in *Local 761*, adopted the same rationale *in haec verba*, and remanded the case for determination as to the type of work which was being performed by the men using the separate gate. It expressly pointed out that "if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operation." 366 U. S. at 681.

Thus, these two decisions laid at rest the notion that any appeal to secondary employees is unlawful unless it is an unavoidable consequence of an appeal to primary employees, and established instead the more realistic rule that a striking union may induce employees of other employers not to work at the premises of the struck employer, if the employees involved are making deliveries or are otherwise do-

ing work related to the struck plant's normal operations.

The decision in the present case, therefore, is completely in conflict with those decisions. Judge Waterman's entire opinion is premised on the now discredited notion that the Act prohibits any direct appeals to secondary employees which can be avoided without impairing the union's ability to reach the primary employees. It relies on cases which were decided between 1952 and 1961, some of which, as we have seen, have been specifically overruled, and none of which can logically survive *Local 761* and *United Steelworkers*.

Judge Waterman's reading of *Local 761* as applying only to picketing "at the premises of the primary employer," and [fol. 438] not at a railroad right of way immediately adjacent to the struck plant which is used for deliveries to the struck employer, is simply erroneous. The statute prohibits certain types of appeals to employees of neutral employers. The question involved in all the cases reviewed above has been whether all such appeals are prohibited, or whether the union has the right, in connection with a lawful primary strike, to appeal to secondary as well as primary employees not to work at the struck premises. *Local 761* finally resolved that question by holding that such appeals are permissible where the work performed by the secondary employees at the struck site relates to the struck employer's normal operations.

The location of the picketing or other form of communication by which the union conveys its appeal to the secondary employees has never been determinative in itself. In the period 1952-1961, it was considered relevant by the Board as evidence of whether the union was appealing to secondary employees, or whether it was engaging in a permissible appeal to primary employees which simply had the unavoidable consequence of affecting secondary employees as well. Under *Local 761*, and under the pre-1952 decisions, the location of the picketing is relevant only in so far as it is evidence of whether the union is only asking secondary employees to stop working at the struck site, or whether it is attempting to disrupt the operations of the secondary employer at other places. In the present case, it is conceded by all parties that the union did not interfere with any of

the railroad's operations except those involving pickups and deliveries at the struck plant. The location of the picketing thus has absolutely no bearing on the issues in this case.

If the views we have expressed were simply those of a disappointed litigant, perhaps this Court would be justified in disregarding them. But the National Labor Relations Board, in originally deciding this case, and Judge Lumbard in his dissenting opinion here, both express the view that [fol. 439] this case is controlled by *Local 761*. It can hardly be denied, therefore, that there is at least a substantial question whether the decision which this Court has rendered in this case is in conflict with both the decision of this Court in *United Steelworkers* (in which, incidentally, Judge Lumbard wrote the opinion) and the decision of the Supreme Court in *Local 761*. This, we believe, is sufficient reason for the full Court to consider this case on rehearing.

II—The Question Presented in This Case, Which Is One of Great Importance, Has Not Been Clearly Resolved by the Decision of This Court, Since There Was No Opinion of the Court.

It is a matter of common knowledge, of which this Court may take judicial notice, that industrial plants are typically served by railroads. The *amicus curiae* brief submitted to this Court by the Association of American Railroads states that "railroads own a substantial amount of real estate in the form of industrial sidings." (p. 5) Thus, the question in this case is one which will arise quite frequently in connection with strikes against industrial plants.

It is therefore particularly important that the question in this case be clearly resolved, so that unions in future cases will know what their rights are. It must be remembered that violations of Section 8(b)(4) not only constitute unfair labor practices, but give rise to liability in damages. Section 303, 29 U.S.C. § 187.

The decision of this Court does not provide the necessary clarity. This is so not only because Judge Waterman's opinion is difficult to reconcile with other decisions of this Court and the Supreme Court, as demonstrated above, but also because Judge Swan, while concurring in the result, did not concur in Judge Waterman's opinion. Thus, there is

no opinion of the Court to guide the Board, the parties in this case, or the unions and employers who will inevitably [fol. 440] find themselves in similar situations in the future. This defect can be cured only by a rehearing of this case before the full Court.

Conclusion

For the reasons stated above, as well as those presented in our original brief, intervenors request a rehearing of this case, and suggest that such rehearing be *en banc*.

Respectfully submitted,

David E. Feller, Jerry D. Anker, Feller, Bredhoff
& Anker, 1001 Connecticut Ave., N. W., Washing-
ton 6, D. C., Attorneys for Intervenors.

[fol. 441] [File endorsement omitted]

[fol. 442]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 27,079

[Title omitted]

PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR
REHEARING IN BANC—Filed November 2, 1962

On October 18, 1962, a division of this Court (Judges Waterman and Swan, with Chief Judge Lumbard dissenting) held, contrary to the Board, that the Union¹ violated the secondary boycott provision of the National Labor Relations Act (Section 8(b)(4)(B))² by picketing the gate to the railroad right of way adjacent to the premises of the primary employer (Carrier), for the purpose of inducing the railroad employees not to handle goods and supplies incidental to the normal opera-

¹ United Steelworkers and its Local 5895, intervenors herein.

² Insofar as here relevant, Section 8(b)(4)(B) of the Act as amended in 1959, the provision involved in this case, is the same as Section 8(b)(4)(A) of the 1947 Act.

tions of Carrier. The Board respectfully petitions for a rehearing in banc of this decision, for it adjudicates an important issue¹ in a manner contrary to the principles set forth in other decisions of this Court and in the recent decision of the Supreme Court in *Local 761, IUE [General Electric Co.] v. N.L.R.B.*, 366 U. S. 667.

1. The Court concluded that the picketing at the railroad right of way adjacent to the Carrier plant was "secondary," and not "primary" as the Board had found, because in picketing there "the union was not furthering its legitimate objective of publicizing its dispute to Carrier employees. Eight gates on the employer's premises existed, and were picketed, for this purpose. Carrier employees were not permitted access to the plant through the gate on the railroad right of way. In picketing on the railroad right of way the union demonstrated that its manifest, and sole, objective was to induce or to encourage railroad employees, or to coerce the railroad, to refuse to handle Carrier goods or otherwise to deal with the primary employer." (Slip op. 3264-3265.)

However, both this Court and the Supreme Court have recognized that the right to engage in primary activity, which the Act protects, includes the right to appeal, not only to the primary employees, but also to secondary employees who furnish goods or perform services in connection with the normal operation of the primary employer's business.

(a) Thus, in *N.L.R.B. v. Local 294, IBT*, 284 F. 2d 887 [fol. 444] (opinion by Judge Friendly), the union, which had a dispute with a trucking company (K-C) and was picketing at its premises, followed K-C's trucks to the premises of its customers and picketed while the trucks were being unloaded there with the help of the customers' employees. This Court rejected the view that the sec-

¹ Numerous industrial plants have railroad sidings comparable to that here. See the *Amicus Brief* of the Association of American Railroads.

² The Board's so-called *Washington Coca Cola* doctrine, 107 NLRB 299, which the Board itself has rejected. See *IBEW Local 861 (Plauche Electric)*, 135 NLRB No. 41, 49 LRRM 1446.

ondary object proscribed by Section 8(b)(4) was established merely by the fact that, notwithstanding that K-C had premises in the area which could and were being picketed, the union had extended the picketing to the premises of neutral employers. The Court stated that this "shows only that the secondary picketing had an objective other than persuading the primary employees, not that the picketing necessarily had the particular object which § 8(b)(4)(A) forbids. . . . Here picketing at the primary employer's premises could be 'effective only as to the non-striking employees and the general public but not as to secondary employers, since only two of K-C's many customers ever came to its warehouse, one once a week and the other once every two weeks, and apparently none ever came to the garage. Yet we have held that an endeavor to persuade secondary employers by picketing at their premises, which were not visited at all by the primary employees, is not necessarily unlawful.'" (284 F. 2d at 891.)⁵ Accordingly, [fol. 445] although the Court went on to find that Section 8(b)(4)(A) had been violated in that case, it did so only because the record showed "activity at the secondary employers' premises in addition to the temporary picketing while K-C's trucks were there (*Id.*, at 892)."

(b) Similarly, in *United Steelworkers v. N.L.R.B.*, 289 F. 2d 591 (opinion by Chief Judge Lumbard), the union picketed the premises of the primary employer (Phelps Dodge), not only at entrances used by its own employees,

⁵ In another portion of its opinion the Court stated (284 F. 2d at 889): "Section 8(b)(4)(A) left a striking labor organization free to use persuasion, including picketing, not only on the primary employer and his employees but on numerous others. Among these were secondary employers who were customers or suppliers of the primary employer and persons dealing with them . . .; and even employees of secondary employers so long as the labor organization did not engage in or 'induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment' to handle goods of or for the primary employer with the object of forcing the secondary employer to cease dealing with him."

⁶ See also, *N.L.R.B. v. Service Trade Chauffeurs Local 145*, 191 F. 2d 65 (C.A. 2, per Judge Frank).

but also at an entrance set aside exclusively for the use of the employees of independent contractors who were constructing an air filter device necessary to bring the plant into compliance with city safety standards. This Court found that the union violated Section 8(b)(4)(A) by picketing at the contractors' gate, but on limited grounds. That is, the Court rejected the broad principle that the picketing was secondary merely because a deliberate effort had been made to reach the contractor's employees, predicated its holding instead on the circumstances that, not only was there a separate gate, but the work done by the men who used the gate was "unrelated to the normal operations" of the primary employer, and such work was "of a kind that would not, if done when the plant were engaged in its [fol. 446] regular operations, necessitate curtailing those operations" (289 F. 2d at 594). This means that, if, for example, the contractors' employees had been performing work related to the normal operations of Phelps Dodge, the Court would have found the picketing at the separate gate, though aimed at the contractors' employees, to be legitimate primary activity.

(c) The principle articulated by this Court in *United Steelworkers* was specifically approved and adopted by the Supreme Court in *Local 761, IUE (General Electric Co.) v. N.L.R.B.*, 366 U.S. 667, which also involved picketing at the primary employer's premises, at a gate reserved for employees of independent contractors performing work on those premises.¹

2. Under the foregoing principles, the railroad picketing in this case should have been found to be primary

¹ The Supreme Court remanded the case to the Board to determine whether the work being performed by the contractors' employees was related to the primary employer's normal operations, since, unlike in *Steelworkers*, the record did not clearly answer that question. The Board thereafter found that a substantial part of the work was so related, and accordingly held that the picketing at the contractors' gate was privileged. *General Electric Co.*, 138 NLRB No. 38, 51 LRRM 1028.

and thus not violative of Section 8(b)(4)(B).^{*} To be sure, the picketing was aimed at the railroad employees, but, since those employees were transporting goods involved in the normal operation of Carrier's business, the Union had a right, as an incident of engaging in primary picketing [fol. 447] against Carrier, to attempt to induce them not to service the struck plant. And, in making this appeal, the Union confined it so far as possible to the vicinity of that plant, picketing as close to the Carrier premises as it could get and still be sure of reaching the railroad employees. In short, the situation was not, in any meaningful sense, distinguishable from what it would have been in *United Steelworkers* had the contractors using the separate gate been engaged in work connected with Phelps Dodge's normal operations; in that event, this Court would have found the picketing at the separate gate, though deliberately aimed at the contractors' employees, to be primary, and no different result should obtain just because railroad employees rather than contractor employees are involved.

3. The Court attempts to distinguish the instant case on the ground that, in *United Steelworkers* and *General Electric*, the picketing occurred on the premises of the primary employer, whereas here "the union activity occurred on the right of way of the New York Central Railroad" (slip op. 3268-3269). That is, the Court, at this point in its opinion, recognizes that the right to engage in primary activity includes the right to make a deliberate effort to deter secondary employees from transporting goods and supplies to and from the primary employer's plant. But the Court concludes that this effort can only be made on the primary employer's own premises, for only then can it be viewed as an "incident" of the picketing directed against the primary employer instead of economic

^{*} To the extent that the Board's decision in *Chauffeurs, Local 175 (McJunkin)*, 128 NLRB 522, may support a contrary conclusion, the Court overlooks (slip op. 3263) that the view expressed therein was rejected by the Court of Appeals when the case came before it for review. *Chauffeurs v. N.L.R.B.*, 294 F. 2d 261, 262 (C.A. D.C.).

[fol. 448] harm "independently" inflicted upon a neutral employer. (Slip op. 3267-3268.) As Chief Judge Lumbard pointed out in his dissent (slip op. 3279-3280), this makes the legitimacy of the action turn, not upon the union's objective, but on who owns the premises where the picketing occurs. This factor has long been rejected as the determinant of whether activity is secondary or primary. See *Local 761, IUE (General Electric Co.) v. N.L.R.B.*, 366 U.S. 667, 678-679.*

Thus, the basic question is whether the union's appeal to the neutral employees seeks merely to persuade them not to cross the primary picket line, or to engage in a strike against their own employer. Picketing "which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer." *Local 761*, 366 U.S. at 673-674. Where the union exerts its pressure against the secondary employees may often be relevant in determining what the union's object is. Picketing around the primary employer's premises is usually "the most direct and a sufficient means [fol. 449] of publicizing the union's grievance to customers and their suppliers and their employees, who can then, if they choose, respect the picket line and support the union's cause. Ordinarily, therefore, if the union extends its premises, there is a reasonable basis for the inference that the union has attempted more elaborate methods of interference with neutral employers and has sought to embroil them in a dispute not their own" (slip op. 3280, dissent). But, "there

* For example, in *United Steelworkers, supra*, a violation of Section 8(b)(4)(A) was found notwithstanding that the picketing occurred at the primary employer's premises. See also, *Retail Fruit & Vegetable Clerks v. N.L.R.B.*, 249 F. 2d 591 (C.A. 9). On the other hand, in *Seafarers Union v. N.L.R.B.*, 265 F. 2d 585 (C.A. D.C.), and *N.L.R.B. v. General Drivers*, 225 F. 2d 205 (C.A. 5), the picketing was found to be primary though it occurred on the premises of a neutral employer. In Chief Judge Lumbard's words, there is "no more reason to accept as conclusive an ownership test when it works against the union than when it works in its favor. . . ." (Slip op. 3278).

may be cases where picketing elsewhere does not justify the inference that the union has gone too far" (*Ibid.*).

The instant case is in the latter category. As Chief Judge Lombard pointed out (slip op. 3280):

In this case, it is undisputed that the railroad's operations for Carrier were in furtherance of Carrier's normal business. It is equally clear from the record that the picketing employees made no attempt to interfere with any of the railroad's operations for plants other than Carrier. The railroad employees were not encouraged, nor did they refuse, to serve the other plants. The picketing was designed to accomplish no more than picketing outside one of Carrier's own delivery entrances might have accomplished. Because the fence surrounding the railroad's right of way was a continuation of the fence surrounding the Carrier plant, there was no other place where the union could have brought home to the railroad workers servicing Carrier its dispute with Carrier. . . .

[fol. 450] In these circumstances, the mere fact that the railway right of way was owned by the railroad rather than Carrier certainly does not warrant an inference that the Union was pursuing a secondary, as distinguished from a legitimate primary, object in picketing here.¹⁰

4. The principle articulated by the Court has far reaching consequences. Since many industrial plants are served

¹⁰ Insofar as the Court may be suggesting that the picketing on the railroad right of way was not primary because none of the Carrier employees were working on that strip (cf. slip op. 3251), the presence or absence of such employees is not necessarily determinative of the union's objective. As we have shown above, the question is what the union was seeking to have the railroad employees do, and, on this record, it is perfectly clear that they were merely being asked not to service the Carrier plant. In any event, it is wholly unrealistic to view the picketing here as occurring at a location where primary employees were not at work. The part of the railroad right of way where the picketing took place led directly into the Carrier plant where Carrier employees were working; indeed, no picketing occurred more than 35 feet from the gate into the Carrier plant.

by railroads in the same way as is Carrier (see n. 3, *supra*), the practical effect of the Court's holding is to bar appeals to railroad employees not to cross a primary picket line. Railroads and their employees serving a struck plant would thus be accorded more favorable treatment than would truckers and their employees performing a similar function. It is hardly likely that Congress intended such a result; on the contrary, in amending the secondary boycott provision in 1959, Congress sought to place railroads on the same footing as other employers (see slip op. 3282).

[fol. 451]

Conclusion

For these reasons, we respectfully request that the case be reheard by this Court in banc, and that upon such rehearing the company's petition for review should be denied.

Stuart Bothman, General Counsel; Dominick L. Manoli, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel; Norton J. Come, Assistant General Counsel; Melvin J. Welles, Hans J. Lehmann, Attorneys, National Labor Relations Board.

Certificate of Counsel

Marcel Mallet-Prevost, Assistant General Counsel of the National Labor Relations Board, certifies that he has read and knows the contents of the foregoing petition and that said petition is presented in good faith and not for purposes of delay.

Marcel Mallet-Prevost, Assistant General Counsel,
National Labor Relations Board.

October —, 1962.

Certificate

Copies mailed to opposing counsel as per Certificate of Service on file.

[fol. 452]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 198—September Term, 1961

Petitions for Rehearing and Rehearing in Banc

Submitted November 1, 1962

Docket No. 27079

CARRIER CORPORATION, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

Stuart Rothman, General Counsel (Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Norton J. Come, Assistant General Counsel, Melvin J. Welles and Hans J. Lehmann, on the brief), for respondent, National Labor Relations Board.

David E. Feller (Jerry D. Anker and Feller, Bredhoff & Anker, Washington, D. C., on the brief), for intervenors, United Steelworkers of America, AFL-CIO, and its Local Union 5895.

OPINION ON PETITIONS FOR REHEARING—December 12, 1962

[fol. 453] Before: Lumbard, Chief Judge, Swan and Waterman, Circuit Judges.

Per Curiam:

The respective petitions for rehearing are severally denied. Judge Swan has filed a memorandum, appended hereto. Chief Judge Lumbard adheres to his dissenting opinion heretofore filed.

Without objection the opinion of Judge Waterman heretofore filed on October 18, 1962 is amended as follows:

1. A new footnote, numbered 6, is inserted on page 3263, after the language "(Footnotes omitted)" which footnote reads as follows:

* Although our purpose in quoting from the Board's opinion in the *McJunkin* case is to demonstrate the approach the Board had toward situations like the one before us, both the Board and the intervenor Union have called our attention to the subsequent Judicial history of the case as demonstrating that our quotation of the Board's clearly expressed rationale of discussion is of no present moment.

The Union petitioned the Court of Appeals for the District of Columbia to review the Board's order. The Board cross-petitioned seeking full enforcement. *Teamsters Local Union No. 175 v. NLRB*, 294 F. 2d 261 (1961). The court unanimously held that the Union, in aid of a strike against a distributor of industrial products; *McJunkin*, clearly violated §8(b)(4)(A) as amended, when, at the premises of a neutral employer trucking concern, it induced the employees of that trucking company not to unload a *McJunkin* truck for transshipment. Nevertheless, a divided court, Chief Judge Miller dissenting, also held it was not unlawful for the Union to pursue the same objective by picketing at a separate entrance to the struck employer's plant. The court's opinion is a one paragraph per curiam and the opinion may have more importance than is presently evident, but it would appear that the results that the District of Columbia court reached (even though relying upon a distinction that appears to be without a difference) are consistent with the results we reach here, for they held, as we do, that it is an unlawful objective for a Union to induce employees of a secondary employer to engage in a secondary boycott when the inducement so to do is conducted, as here, on the secondary employer's premises.

[fol. 454] 2. Present footnote 6 on page 3264 is re-numbered footnote 7.

3. After the word "provisions" at the end of subparagraph D on page 3264, a new footnote, to be numbered footnote 8, is inserted, reading as follows:

* We view the decision and order of the Board in the case before us as a departure from these principles. Another Board departure may be found in *Local 861, IBEW (Planche Electric, Inc.)*, 135 N. L. R. B. No. 41, 49 LRRM 1446 (Jan. 12, 1962). There, although the struck employer had a place of business where his employees reported at the beginning and end of each day and where those employees could have been reached by traditional primary picketing, union members picketed a common job site elsewhere owned

by a neutral employer. Despite this, the Board, two members dissenting, held the union activities at the common job site lawful under 8(b)(4). The opinion written for the three member majority stated the majority was "overruling *Washington Coca Cola* to the extent it is inconsistent," but the opinion offers no hint of a theory to justify its result, save a distaste for "rigid rules" and a new understanding of a supposed congressional intent. The opinion indicates that picketing strikers are still forbidden to have, as even one of their objectives, the objective of affecting the conduct of employees of secondary employers and if results adverse to neutral employers occasioned by the picketing do occur, they can only be justified if they are "incidental results." We find nothing in the opinion to demonstrate that the union had any legitimate reason for extending its picketing activities beyond the primary employer's regular place of business in the locality. All the fact patterns are the same as those in *Washington Coca Cola*. Only the Board's expertise in labor-management affairs appears to have taken a new direction with the advent of a new decade.

4. On page 3269, after the paragraph ending with the words "case at bar" the following is inserted:

Nor do we find the decision of this court in *N. L. R. B. v. Local 294, I. B. T.*, 284 F. 2d 887 (2 Cir. 1960), to be inconsistent with the result herein. In that case which, like *General Electric*, was expressly decided under the law prior to the 1959 amendments to the Act, members of the respondent Union picketed trucks of the struck employer while pickups and deliveries were being made at neutral employers' premises. Although it was evident that the union [fol. 455] activities were directed to *secondary* rather than primary employees, we ruled that under the Act prior to the 1959 amendments this fact would not be determinative of illegality unless the neutral employees were encouraged to engage in "a strike or concerted refusal . . . to handle goods of or for the primary employer," 284 F. 2d at 889 (citing *N. L. R. B. v. International Rice Milling Co.*, *supra*). From requests which the strikers had made to the neutral employees not to handle the goods of the struck employer, we found the requisite inducement to concerted activity and granted enforcement of the Board order. Since the enactment of the 1959 amendments, however, as we have set forth more fully above, the inducement to concerted activity by neutral employees is no longer re-

quired for the proscriptions of § 8(b)(4)(A) to come into operation. The amended Act has been broadened by its terms to proscribe any inducement to any neutral employee not to handle the goods of the struck employer.

SWAN, Circuit Judge:

The intervenors' petition for rehearing asserts that because I concurred in the result of Judge Waterman's opinion "there is no opinion of the Court to guide the Board, the parties in this case, or the unions or employers who will inevitably find themselves in similar situations in the future." I concurred in the result not because I disagree with anything stated therein (I do not) but because Judge Waterman's opinion failed to include certain additional grounds for affirmance which I thought relevant.

[fol. 456]

OPINION ON PETITIONS FOR REHEARING IN BANC

Before: Lumbard, Chief Judge, Clark, Waterman, Moore, Friendly, Smith, Kaufman, Hays and Marshall, Circuit Judges.

Per Curiam:

All of the active judges concurring, except Judge Clark, Judge Smith and Judge Hays who vote to grant, the petition for rehearing in banc is denied.

Judge Clark dissents in separate opinion.

CLARK, Circuit Judge (dissenting from the order denying rehearing in banc):

On any of the principles governing the selections of cases to be heard in banc either suggested intermurally or of which I can conceive, the present case would seem a *fortiori* one for such consideration. There can be no question of the importance of the issue; and the present de-

parture from previous holdings of this court and of the Supreme Court, even if not as clear as I believe it to be, certainly presents a *prima facie* case of conflicting precedents. Further, the decision, which rejects the expertise of the National Labor Relations Board, is made by only one of the active judges, with the concurrence of a senior judge and against the powerful dissent of the Chief Judge. An additional anomaly is that the vote on the present order, together with this dissent, shows at least four active judges discontented with the decision; since only one active judge is recorded in favor of it, it seems highly probable that it represents the views at most of only a minority of the court. Because our *in banc* proceedings have actually settled so [fol. 457] little, have emphasized division rather than allayed it, I could view with equanimity a decision, if legal, to return to our old course of hearing no cases *in banc*; but our present discriminatory approach, with its correlative consequence, as in a case such as this, of misstating the real position of the court and misleading litigants and others properly interested, seems to me wholly undesirable.

Here we are dealing with the sensitive area in labor relations of the secondary boycott, and particularly with the proviso for "primary picketing" expressly permitted by § 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U. S. C. § 158(b)(4)(ii)(B). It seems clear and essentially conceded that the union acts in issue would be within the proviso except that they occurred on the railroad right of way, and not on Carrier's premises. But this emphasis on bare legal title has no connection with the purpose or effect of the proviso, and appears to be the statement of a distinction without a difference. Moreover, it is expressly disclaimed in *United Steelworkers of America, AFL-CIO v. N.L.R.B.*, 2 Cir., 289 F. 2d 591, 594, and in *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO v. N.L.R.B.*, 366 U. S. 667, 678-681, citing the *Steelworkers* case with approval. Thus the situation calls strongly for review by the entire court.

[fol. 458]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon.
Thomas W. Swan, Hon. Sterry R. Waterman, Circuit
Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—
December 12, 1962

A petition for a rehearing having been filed herein by
counsel for the intervenor, United States Steelworkers of
America AFL-CIO and its Local Union 5895,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 459]

[File endorsement omitted]

[fol. 460]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon.
Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard
P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith,
Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. Thur-
good Marshall, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING IN BANC—
December 12, 1962

A petition for a rehearing in banc having been filed
herein by counsel for the intervenor, United States Steel-
workers of America AFL-CIO and its Local Union 5895,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 461] [File endorsement omitted]

[fol. 462] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 463]

SUPREME COURT OF THE UNITED STATES

No. 925—October Term, 1962

UNITED STEELWORKERS OF AMERICA, AFL-CIO, et al.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, et al.

ORDER ALLOWING CERTIORARI—May 13, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.

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MAR. 12. 1963

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND
LOCAL UNION 5895, UNITED STEELWORKERS OF
AMERICA, AFL-CIO,

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD
AND
CARRIER CORPORATION

PETITION FOR A WRIT OF HABEAS CORPUS TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER
MICHAEL H. GOTTESMAN
1001 Connecticut Avenue, N. W.
Washington 6, D. C.
Attorneys for Petitioners

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND
LOCAL UNION 5895, UNITED STEELWORKERS OF
AMERICA, AFL-CIO,

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD
AND
CARRIER CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on October 18, 1962.

OPINIONS BELOW

The Decision and Order of the National Labor Relations Board (J.A. 362-373),¹ including the Intermediate Report

¹ The record in the Court below was printed in a Joint Appendix, cited herein as "J.A.," nine copies of which have been filed with this Petition.

of the Trial Examiner (J.A. 312), is reported at 132 N.L.R.B. 127. The opinion of the Court of Appeals for the Second Circuit, as originally issued, is reproduced in Appendix A to this petition. On petitions for rehearing and rehearing in banc, the Court issued an order denying rehearing but amending its original opinion, and an order denying rehearing in banc, which was accompanied by a dissenting opinion by Judge Clark. These orders, and Judge Clark's dissent, appear in Appendix B to this petition. The opinion of the Court as amended, together with the denial of rehearing in banc and Judge Clark's dissent, are reported at 311 F. 2d 135.

JURISDICTION

The judgment of the Court of Appeals was entered on October 18, 1962. Timely petitions for rehearing and rehearing in banc were denied on December 12, 1962. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Section 8(b)(4)(B) of the National Labor Relations Act prohibits a union which is engaged in a lawful strike at an industrial plant from picketing at the gate at which a railroad-owned spur track enters the plant, for the purpose of inducing persons employed by the railroad not to make pickups and deliveries at the struck plant.

STATUTES INVOLVED

Section 7 of the National Labor Relations Act, 49 Stat. 452 (1935), as amended 29 U.S.C. § 157 (1958), states as follows:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the

purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(b)(4)(B) of the Act, as amended, 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(B) (Supp. I, 1959), states in pertinent part as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4) (i) to engage in, or to induce, or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . ."

Section 13 of the Act, 49 Stat. 457 (1935), as amended 29 U.S.C. 163 (1958), states as follows:

"Nothing in this Act, except as specifically provided

for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

STATEMENT OF THE CASE

In this case a divided Court of Appeals, reversing a decision of the National Labor Relations Board, has held that a union committed a "secondary boycott" in violation of Section 8(b)(4)(B) of the National Labor Relations Act when it attempted to induce employees of a railroad not to pick up or deliver goods at a plant where the union was engaged in a legitimate economic strike.

A. *The Facts*

The essential facts can be simply stated. The United Steelworkers of America was, at the time this case arose, the collective bargaining representative of the employees of the Carrier Corporation at its Syracuse, New York plant. In March, 1960, after a period of fruitless negotiations for a collective bargaining agreement, the union called a strike. In connection with that strike, it picketed the various entrances to the plant premises. One of the entrances picketed by the union is that which is used by the New York Central Railroad in making pickups and deliveries at Carrier. It is the lawfulness of the picketing at that entrance which is in issue in this case.

The New York Central serves Carrier by means of a spur which runs along the southern border of the Carrier premises (J.A. 317). The spur passes through a gate in a chain-link fence which runs along the western border of the Carrier premises and continues along the southern side of the spur, thus putting both the spur and the Carrier plant within the same enclosure (J.A. 319). At one time Carrier had owned all the property inside the plant fence, but it had conveyed the strip on which the spur runs to the railroad

prior to the events of this case (J.A. 318). The same spur also serves other industrial plants adjacent to Carrier's (J.A. 317).

For the first nine days of the strike, the railroad made no effort to serve Carrier, and the union made no effort to interfere with the railroad's use of the spur to serve its other customers (J.A. 319). On the tenth day, however, after serving its other customers without incident, the railroad attempted to pick up loaded freight cars, containing Carrier products, from the Carrier plant and replace them with "empties" (J.A. 319-20). At this point, the union, by picketing and other means, attempted to prevent the railroad from completing this operation (J.A. 320-23).

B. *The Decision of the Board*

In so far as the union's conduct at the railroad gate and elsewhere went beyond peaceful picketing and involved force and threats of force, the Board found it to be violative of Section 8(b)(1)(A) of the Act. The union consented to the enforcement of the Board's order remedying those violations, and they are no longer part of the case.

As to the alleged violation of Section 8(b)(4)(B), the Board held that this case was controlled by *Local 761 v. NLRB*, 336 U. S. 667 (1961), in which this Court had held that a striking union may picket a gate to the struck premises which is used exclusively by employees of other employers, if those employees perform work at the struck site which relates to the normal operations of the primary employer. The Board relied on this Court's specific statement that "if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations" (J.A. 364).

The Board regarded as immaterial the fact that the railroad tracks, and the gate through which they passed, happened to be owned by the New York Central and not by

Carrier. It pointed out that "the gate was an entrance directly into the Carrier premises which the railroad had to use in order to carry out its function of transporting Carrier products to and from the Carrier plant" (J.A. 365 n.1). It concluded that the "key to the problem is to be found in the type of work being done by those passing through the gate," and found that "the services performed by New York Central for Carrier—the delivery of empty box cars to Carrier and the transportation of Carrier products—clearly were related to Carrier's normal operations" (J.A. 365-66). It therefore held that the union had not violated Section 8 (b) (4) (B).

Member Rodgers dissented (J.A. 369-71). He argued that since the railroad tracks were owned by the railroad, not by Carrier, the case was distinguishable from *Local 761*. He also argued that the fact that the union's picketing was accompanied by violence made it not only a violation of Section 8(b) (1) (A), but 8(b) (4) (B) as well.

C. *The Decision of the Court of Appeals*

On review, the Court of Appeals for the Second Circuit reversed the decision of the Board, Chief Judge Lumbard dissenting. The majority opinion, after tracing the development of the law under Section 8(b) (4), concluded that the only legitimate objective of picketing is to appeal to primary employees, and that "involvement of *neutral employees*" (emphasis in original) is permissible only "if incidental to the pursuit of a legitimate primary objective." Thus, the Court stated, picketing must be conducted "in such a manner and at such a place as to minimize its impact on neutral employees insofar as this could be done without substantial impairment of the effectiveness of the picketing in reaching primary employees." (App. A, p. 42-43).

The court then applied these principles to the facts of this case:

"The relevance of these principles to the issue before

us is clear. In picketing the railroad right of way adjacent to the Carrier plant, the union was not furthering its legitimate objective of publicizing its dispute to Carrier employees. Eight gates on the employer's premises existed, and were picketed, for this purpose. Carrier employees were not permitted access to the plant through the gate on the railroad right of way. In picketing on the railroad right of way the union demonstrated that its manifest, and *sole*, objective was to induce or to encourage railroad employees, or to coerce the railroad, to refuse to handle Carrier goods or otherwise to deal with the primary employer. Such results, although permissible when merely incidental to the pursuit of legitimate objectives, *DiGiorgio Fruit Corp. v. NLRB*, 191 F. 2d 642 (D.C. Cir. 1951), here involved no such redemptive feature. The actions of the union were thus in violation of §§ 8(b)(4)(i) and (ii) (B) of the Act." (App. A, p. 43) (Emphasis in original).

The court then turned to a discussion of the decisions of other circuits. After citing a number of decisions which it considered "consistent with the principles set forth above," it discussed in detail the decision of the District of Columbia Circuit in *Seafarers International Union v. NLRB*, 265 F. 2d 585 (1959), which "denied enforcement of an order of the Board which was clearly required by these principles." (App. A, p. 43-44.) It concluded that the decision of the court in that case was erroneous, and stated that "insofar as the decision . . . rests upon a line of reasoning we cannot accept, we find the case unpersuasive." (App. A, p. 46.)

Finally, the court dealt with the argument that the Board's decision is supported by this Court's decision in *Local 761*:

"The Court's holding in [*Local 761*] does not, of course, conflict with the result we here reach. In both

cases, union picketing activities are held to violate § 8 (b) (4) of the Act because of their appeal to neutral employees. In [*Local 761*], the picketing took place at the premises of the employer with whom the union was engaged in a dispute. The Supreme Court limited its finding of illegality, therefore, to circumstances in which the neutral employees were not engaged in work connected with the normal operations of the plant. In so limiting its holding the Court acknowledged the special solicitude of Congress and the Board that the statute not unduly restrict traditional picketing at the premises of the primary employer . . .

"In this case, however, the union activity occurred on the right of way of the New York Central Railroad. No special policy of greater latitude for picketing at the primary employer's premises thus comes into play, and no distinction based on the work performed by the neutral employees need be made. . . ." (App. A, p. 46-47.)

Chief Judge Lumbard dissented. The crux of his opinion is contained in the following paragraph:

"As I understand the cases in this area, the lawfulness of picketing depends on the legitimacy of the union's objective; the place where the picketing occurs is controlling only insofar as it sheds light on the union's objective. The legitimate objectives of picketing include publicizing a dispute to employees of neutral employers who are performing part of the everyday operations of the struck employer. Since the picketing which occurred here had that objective, and since there was no other place where the union could conduct such picketing, I agree with the National Labor Relations Board that there was no violation of the Act." (App. A, p. 48.)

The dissent pointed out that the majority's premise—"that the only lawful objective of picketing is to reach the

employees of the primary employer"—is squarely in conflict with *Local 761* (App. A, p. 56.) And it rejected as irrelevant the majority's preoccupation with ownership of the railroad right-of-way.

"Nowhere in the opinion in *Local 761* can I find the 'special solicitude' for picketing the premises of a primary employer which the majority finds, except insofar as the location of the picketing indicates its motive. . . . What the [majority's] alleged distinction comes down to is that the union can seek to influence neutral employees at the premises of the primary employer and not elsewhere (which in this case means, of course, that it cannot use pickets to influence the railroad workers at all). But this makes the test not the union's objective but the location of the picketing, a test which the majority itself admits to be obsolete" (App. A, p. 57.)

Both the Board and the Union petitioned for rehearing and for rehearing in banc. On December 12, 1962, the petitions were denied, Judges Clark, Smith and Hays dissenting on the denial of rehearing in banc (App. B). It was announced that Chief Judge Lumbard, though he did not vote for rehearing, "adheres to his dissenting opinion heretofore filed" (App. B, p. 62). Judge Waterman amended his opinion to respond to the contention in the petitions that certain of the cases upon which he relied in his opinion had been expressly overruled or reversed (App. B, p. 62-64). Judge Clark filed an opinion explaining his dissent, in which he stated that "There can be no question of the importance of the issue; and the present departure from previous holdings of this court and of the Supreme Court, even if not as clear as I believe it to be, certainly presents a *prima facie* case of conflicting precedents" (App. B, p. 65). With respect to the merits Judge Clark stated:

"It seems clear and essentially conceded that the

union acts in issue would be within the proviso [exempting 'primary picketing' from Section 8(b)(4)] except that they occurred on the railroad right of way, and not on Carrier's premises. But this emphasis on bare legal title has no connection with the purpose or effect of the proviso, and appears to be the statement of a distinction without a difference. Moreover, it is expressly disclaimed in *United Steelworkers of America, AFL-CIO v. NLRB*, 2 Cir. 289 F.2d 591, 594, and in *Local 761* . . . , citing the *Steelworkers* case with approval. Thus the situation calls strongly for review by the entire court."

REASONS FOR GRANTING THE WRIT

1. The decision below, both in its reasoning and in its result, is in direct conflict with this Court's decision in *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U. S. 667 (1961). This is not our opinion alone. It is the opinion of a majority of the NLRB, and it is the opinion of two of the four judges on the court below who expressed themselves on the subject, Judges Lumbard and Clark. It is also the opinion of at least one commentator. Leshnick, *The Gravamen of the Secondary Boycott*, 62 Colum. L. Rev. 1363, 1390 n. 138 (1962).

In *Local 761*, the question presented was whether a striking union could lawfully picket a gate to the struck premises which was set aside for the exclusive use of employees of other employers who performed work at those premises. The Board and the District of Columbia Circuit had held that such picketing was unlawful because the union's object was "to enmesh these employees of the neutral employers in its dispute with the Company." 366 U. S. at 671. This Court reversed, holding that:

"The key to the problem is found in the type of work that is being performed by those who use the separate gate. It is significant that the Board has since applied

its rationale, first stated in the present case, only to situations where the independent workers were performing tasks unconnected to the normal operations of the struck employer—usually construction work on his buildings. In such situations, the indicated limitations on picketing activity respect the balance of competing interests that Congress has required the Board to enforce. *On the other hand, if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employers whose tasks aid the employer's everyday operations*" 366 U. S. at 680-81 (Emphasis added).

Accordingly, the case was remanded to the NLRB with instructions to make findings on the nature of the work performed by the employees using the gate, and the Board subsequently found that the work was such as to make the picketing lawful. 138 N.L.R.B. No. 38, 51 L.R.R.M. 1028 (1962).¹

It is simply not possible to square the holding of this Court, that picketing of a gate used *exclusively* by secondary employees may be lawful, with the holding of the court below that picketing is lawful only if its "object" is to appeal to primary employees, and that it must be conducted in such a manner "as to minimize its impact on neutral employees insofar as this could be done without substantial impairment

¹ Although the present case arose after the 1959 amendments to the Act, while *Local 761* arose under the pre-1959 version, the question of whether picketing in any given case is "primary" or "secondary," which is the question involved in both cases, is unaffected by the amendments. See 366 U. S. at 681. The only difference is that the governing language formerly was found in 8(b)(4)(A), and is now found, essentially unchanged, in 8(b)(4)(B). The amendments are relevant to this case only in so far as they afford railroads the same protections which were previously afforded only to employers covered by the Act. See 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 1522-23, 1706-07, 1712, 1857.

of the effectiveness of the picketing in reaching primary employees."

Nowhere does the court below really come to grips with this obvious conflict. The court's opinion first argues at great length that the lawfulness of any picketing is to be determined on the basis of whether it is intended to appeal to primary or secondary employees, and then proceeds to distinguish the picketing in *Local 761* from the picketing in the present case not on that basis but on the basis of an alleged difference in the location of the picketing involved in the two cases. This distinction is obviously irrelevant even in terms of the court's own reasoning. Indeed, the court's holding that picketing which is addressed to secondary employees is prohibited was based in large part on two Board decisions which had held picketing at the primary employer's premises to be unlawful because of its effect on secondary employees. *Retail Fruit and Vegetable Clerks (Crystal Palace Market)*, 116 N.L.R.B. 858 (1956); *Chauffeurs Local 175 (McJunkin Corp.)*, 128 N.L.R.B. 522 (1960). And when, in the petitions for rehearing, it was pointed out that the latter case had been reversed by the District of Columbia Circuit, *Chauffeurs Local No. 175 v. NLRB*, 294 F. 2d 261 (1961), the court added a footnote to its opinion in which it distinguished the case on the ground that the picketing there took place at the primary employer's premises and simultaneously expressed the view that this is "a distinction which appears to be without a difference." (App. B, at p. 62.)

This "distinction without a difference" is the only basis which the court could find for distinguishing *Local 761*. It is a distinction which the court itself found unpersuasive, and which is inconsistent with the analysis contained in the balance of the opinion.

More to the point, perhaps, is the fact that the distinction conflicts not only with the rationale of the decision below, but also with the rationale of the *Local 761* decision itself.

The result reached in *Local 761* was based on this Court's analysis of what types of picketing are "primary" and protected by the Act, and what types are "secondary" and thus within the prohibition of Section 8(b)(4). In making that analysis, this Court began by rejecting the notion, expressed in some of the early Board cases (notably *United Elec. Workers*, 85 N.L.R.B. 417 (1949)), that any picketing which takes place around the primary employer's premises is lawful. 366 U. S. at 674-679. But it also rejected the test which had been relied on by the Board and the court of appeals in *Local 761*—that any picketing which "enmeshes" secondary employees in the primary dispute is prohibited by the Act.

"... picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer." 366 U. S. at 673-74.

Instead, the court adopted a very practical test. It recognized, on the one hand, that in every primary strike the striking union appeals not only to primary employees, but to customers, suppliers, deliverymen, etc., not to enter the struck premises, and that Congress did not intend to prohibit "traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations." 366 U. S. at 681. It recognized also, however, that Congress did intend that the activities of neutral employees which bore no relation to the normal operations of the struck employer were not to be interfered with, and accordingly held that such activities should be protected even where they take place on the struck employer's premises. Therefore, the court concluded that when a union appeals to secondary employees to refrain from working at the struck employer's premises, the lawfulness of that appeal depends on whether

the work which the secondary employees are asked not to perform is work which is related to the normal operations of the struck employer.

There is not the slightest suggestion in this Court's opinion in *Local 761* that the place at which the appeal to secondary employees occurs has any direct bearing on the problem. Of course, as Judge Lumbard recognized, the location of the union's pickets is often probative of the purpose of the picketing. If, in the present case, the union had picketed the railroad's terminal, it would have had great difficulty contending that its only purpose was to induce railroad employees not to make pickups and deliveries at the Carrier plant. The normal inference would be that the union's purpose was to cause a general disruption of the railroad's business. But here the union in fact picketed only at the gate used by the railroad to make pickups and deliveries at the struck plant, and it is undisputed that the union did not attempt in any way to interfere with any of the railroad's other operations. Thus, the picketing here is precisely the sort of "traditional primary activity" which was held in *Local 761* to be lawful.

2. The holding of the court below that picketing or other appeals are "primary" only when they are addressed to the employees of the primary employer, and are "secondary" when they are specifically directed at other employees, or conducted in such a way as not to minimize their impact on other employees, is squarely in conflict with the following decisions of the Eighth and District of Columbia Circuits: *DiGiorgio Fruit Corp. v. NLRB*, 191 F. 2d 642 (D. C. Cir. 1951); *cert. denied*, 342 U. S. 869 (1951); *Local 618 v. NLRB (Site Oil Co.)*, 249 F. 2d 332 (8th Cir., 1957); *Seafarers International Union v. NLRB (Salt Dome Production Co.)*, 265 F. 2d 585 (D. C. Cir. 1959); *Chaufeurs Local Union No. 175 v. NLRB (McJunkin Corp.)*, 294 F. 2d 261 (D. C. Cir. 1961).

The court below expressly acknowledged the inconsist-

ency between its decision and *Salt Dome*. Although it attempted to distinguish *McJunkin*, it acknowledged that the "distinction appears to be without a difference." (App. B, p. 62). The Court did not discuss the *Site Oil* case at all, and it read *DiGiorgio*, we think erroneously, as not inconsistent with its own view.

Before examining these cases individually, one historical observation must be made. Between the years 1953 and 1961 (when *Local 761* was decided by this Court), the Board seemed to have adopted the same view as was expressed by the court below—that picketing or other appeals which are addressed to secondary, rather than primary, employees are prohibited by the Act, even where such appeals simply ask secondary employees not to work at the site of a primary dispute. This view constituted a radical departure from the doctrine of earlier Board decisions, which held that it is a legitimate part of a primary strike, and not a secondary boycott, for a striking union to appeal to all persons, including secondary employees, not to work at the site of the primary dispute. E.g., *Oil Workers Int'l Union (Pure Oil Co.)*, 84 N.L.R.B. 315 (1949); *Newspaper Deliverers Union (Interborough News Co.)*, 90 N.L.R.B. 2135 (1950); *United Elec. Workers (Ryan Constr. Co.)*, 85 N.L.R.B. 417 (1949). *DiGiorgio* belongs to the pre-1953 period, and the court of appeals in that case affirmed the Board's decision. *Salt Dome*, *Site Oil* and *McJunkin* all belong to the post-1953 period, and in each the court of appeals refused to approve the Board's new view.

We turn now to a brief examination of the facts and holding of each of these cases.

In *DiGiorgio Fruit Corp. v. NLRB*, 191 F. 2d 642 (D. C. Cir. 1951), cert. denied, 342 U. S. 869 (1951), the picketing union halted trucks approaching the primary employer's premises and asked the drivers (who happened to be members of the same union) not to cross the picket line. Drivers who did not honor this request were subjected to dis-

ciplinary proceedings within the union. Neither of these activities, of course, was a necessary part of the union's appeal to primary employees. Nevertheless, both the Board and the Court held that "the activities . . . in this case were a primary activity and not forbidden by the statute." 191 F. 2d at 649.

The court below cited *DiGiorgio* as an example of a case in which the inducement or encouragement of secondary employees "was merely incidental to the pursuit of legitimate objectives." It is apparent that the court simply misread the case, since neither the oral appeals to secondary employees nor the union discipline imposed on them was in any way related to the union's appeal to primary employees.

In *Seafarers International Union v. NLRB (Salt Dome Production Co.)*, 265 F. 2d 585 (D. C. Cir. 1959), the union struck Salt Dome, a shipping company, and picketed at a shipyard owned by Todd, where a Salt Dome ship was being repaired. Two days after the picketing began, Salt Dome removed all of its employees from the ship. The picketing nevertheless continued, the pickets making clear, as in the present case, that the dispute was only with the primary employer. As a result of the picketing, Todd's employees, while they continued to perform their other work, refused to service the ship. The Board, finding that the continuation of the picketing after all primary employees were removed was "convincing proof that the picketing was aimed at Todd's employees," held that this constituted unlawful "secondary" activity. 119 N.L.R.B. 1638 (1958). The Court of Appeals reversed:

"In this case Todd was under economic pressure, because one of its drydocks was unusable and it could not go forward with one piece of business. But this pressure was the same sort as that felt by an employer when one of his major suppliers or customers is being picketed, or that which a contractor feels when a subcontractor is struck at a crucial point in construction. It

was quite different from the kind of pressure Todd would have felt had the Union not made clear that it had no dispute with Todd. The mere fact that Todd felt some pressure from the picketing of the Pelican [Salt Dome's ship] is not dispositive of the problem under Section 8(b)(4). The critical consideration is that the pressure thus put upon Todd was not different from that felt by servicers or suppliers under the most ordinary circumstances when a customer of theirs is picketed" 265 F. 2d at 591.

In *Chauffeurs Local No. 175 v. NLRB (McJunkin Corp.)*, 294 F. 2d 261 (D. C. Cir. 1961), the striking union (1) picketed only the entrance to the primary employer's plant which was used by truck drivers employed by neutral concerns and not generally used by primary employees, (2) telephoned truck drivers employed by other employers, asking them not to service the plant; and (3) picketed at a truck terminal of a secondary employer asking employees of that employer not to unload goods brought from the struck plant. The Trial Examiner found the last-mentioned activity to be "secondary," because it was directed at work to be performed away from the primary site, but found the other activities to be "primary" because they "invited action only at the premises of McJunkin, the primary employer." 128 N.L.R.B. 522, 523. The Board found all the activities to be "secondary," again asserting its post-1953 view that all appeals "directed toward the inducement and encouragement of employees of neutral employers not to handle [the primary employer's] goods" are unlawful. *Id.* at 524. The Court of Appeals affirmed the Board's decision only with respect to the picketing of the neutral terminal. It found the appeals to truck drivers, both at the primary site and by telephone, to be primary:

"The Board's order is apparently intended to prevent the union from inducing employees of any trucking concern to respect the picket line at McJunkin's plant. But

peaceful primary picketing and its normal incidents, including requests to neutrals not to cross the picket line, cannot be forbidden . . ." 294 F. 2d at 262.

In *Local 618 v. NLRB (Site Oil Co.)*, 249 F. 2d 332 (8th Cir. 1957), the union struck and picketed fourteen retail gas stations operated by Site Oil, the primary employer. After picketing had continued for some time, Site Oil removed all the primary employees from one station and discontinued its servicing operation, leaving only independent contractors who were remodeling the station. The Union continued its picketing at that station, and employees of the independent contractors honored the picket line. The Board, finding a "total absence of any of Site's 'primary' employees from the vicinity," held that the picketing was thereby rendered necessarily "secondary," 116 N.L.R.B. 1844 (1956). The Eighth Circuit reversed. Noting that "The scope of a strike is much broader than discouraging replacement employees" (249 F. 2d at 337), the Court found no evidence which would suggest that the picketing did not have a "legitimate purpose in connection with the primary strike" (*Id.* at 336).

Each of the above-described decisions holds that a union may legitimately appeal, directly and intentionally, to secondary employees to induce them to stay away from the primary site. The opinion below, therefore, is in direct conflict with each of these decisions.

Significantly, none of these cases except *Site Oil* can be distinguished, as the court below attempted to distinguish *Local 761*, on the ground that the appeals to secondary employees took place only at the primary employer's premises. In each of the other three cases, the union appealed to secondary employees at places other than the premises of the primary employer. Thus, in *DiGiorgio*, union discipline was imposed, away from the primary site, on secondary employees who entered the struck premises; in *McJunkin*, the union telephoned secondary employees, asking them not to

serve the struck employer; and in *Salt Dome* the union picketed in front of the premises of the secondary employer, Todd, in order to induce Todd's employees not to service the primary employer's ship. In each case, the place where the union communicated to the secondary employees was considered irrelevant. The controlling consideration was that the union was only asking the secondary employees not to work at the site of the primary dispute.

3. The issue presented in this case is of vital importance to the administration of the National Labor Relations Act. It involves the balancing of two interests which are at the heart of the federal labor policy—the interest of employees in engaging in strikes and other concerted activities, and the interest of neutral employers to be free “from pressures in controversies not their own”—in the context in which those interests necessarily clash, the context of the ordinary, everyday economic strike.

In an effort to achieve the precise balance which Congress intended, the Board and the courts have, for a decade and a half, attempted to define the boundary between legitimate primary activity and prohibited secondary activity. As noted by this Court in *Local 761*, this has often involved “the drawing of lines more nice than obvious.” In many situations, unions have been required to act at their peril, without any real guidance as to what their rights are.

One might have expected that after fifteen years of litigation, the law would have at least been able to provide a clear answer to the problem which is necessarily present in every strike situation: to what extent, if any, may the striking union attempt to prevent employees of other employers from entering the struck premises? Yet on this narrow and seemingly simple question, the law has zig-zagged back and forth in an entirely unpredictable manner.

Frankly, we had thought that with the decision in *Local 761*, the question had at last been put to rest. Apparently it has not. For in this case, perhaps the first to arise after

Local 761, the Board reaches one result (with one Member dissenting), and the Second Circuit reaches the opposite result (with one Judge dissenting and another indicating his sympathy with the dissent).

There is nothing unusual about the facts of this case. Almost every industrial plant is served by a railroad spur. And, as pointed out by the American Railroad Association in its amicus brief in the court below, many of these industrial sidings are owned by the railroad, not the industrial employer. Is it lawful to picket such a siding, or is it not? The question cries for an answer, and only this Court can answer it.³

³ Since the protections of Section 8(b) (4) did not extend to railroads prior to the 1959 amendments, see note 1 at page 11, *supra*, cases involving railroad spur picketing rarely came before the Board. But see *Int'l Bhd. of Teamsters (Int'l Rice Milling Co.)*, 84 N.L.R.B. 360 (1940), *rev'd*, 183 F. 2d 21 (5th Cir., 1950), *rev'd on other grounds*, 341 U. S. 665 (1951); *International Woodworkers of America (Wm T. Smith Lumber Co.)*, 116 N.L.R.B. 1756 (1956), *rev'd* 246 F. 2d 129 (5th Cir. 1957); *Lumber & Sawmill Workers (Great Northern Ry. Co.)*, 122 N.L.R.B. 1403, *rev'd* 272 F. 2d 741 (9th Cir. 1959) *Cf. Knapp v. Steelworkers*, 179 F. Supp. 90 (D. Minn. 1959). However, the frequency with which such picketing takes place is illustrated by the great number of cases involving railroad-spur picketing which came to the courts in the form of actions for injunctions or damages for tortious conduct in connection with such picketing. *In re Missouri Pacific*, 23 L.R.R.M. 2135 (E.D. Mo. 1948); *Atchison, T. & S. F. Ry. v. Sillampa*, 26 L.R.R.M. 2310 (D. N. M. 1949); *Atchison, T. & S. F. Ry. v. Iron Workers Local 546*, 26 L.R.R.M. 2367 (W. D. Okla. 1950); *Illinois Central R. R. v. Teamsters Local 568*, 90 F. Supp. 640 (W. D. La. 1950); *Missouri Pacific R. R. v. Brick & Clay Workers*, 238 S. W. 2d 945 (Ark. 1951); *Teamsters v. Missouri Pacific R. R.*, 27 L.R.R.M. 2576 (Ark. 1951); *Erie R. R. v. Longshoremen, ILA*, 117 F. Supp. 157 (W. D. N. Y. 1953); *Wichita Falls, R. R. v. Machinists*, 238 S. W. 2d 265 (Tex. Ct. Civ. App. 1954); *Louisville & N. R. R. v. Railroad Trainmen*, 35 L.R.R.M. 2615 (Ky. Cir. Ct. 1955); *Great Northern Ry. v. Lumber & Sawmill Workers*, 140 F. Supp. 393 (D. Mont. 1955), *aff'd*, 232 F. 2d 628 (9th Cir. 1956). Railroad-spur picketing also became the subject of suits by primary employers against carriers for breach of duty to carry. *Montgomery*

Nor is the issue here limited to the question of the union's right to picket a railroad-owned spur, important as that question is. For the court seems to hold that any picketing or other appeal which is addressed to employees of secondary employers is unlawful, thus wiping out most of the law which has painfully evolved over the past fifteen years. Then, in the next breath, it suggests that perhaps that rule is not applicable if the picketing takes place at the primary employer's premises. Does that mean that a truck entrance may be picketed, but not a railroad entrance? What if the primary employer conveys to the trucking company the driveway leading from the gate to the plant? And what about union efforts to communicate with secondary employees by letter, telegram, speeches at union meetings, etc.?

Uncertainty in any area of the law is an evil. Uncertainty in an area of the law which affects the daily lives and decisions of millions of people is that much greater an evil. And uncertainty in the area of the law here involved is an even greater-than-usual evil. Section 10(1) of the Act, 29 U.S.C. § 160(1), requires the General Counsel of the Board, whenever he issues a complaint under Section 8(b)(4), to seek a preliminary injunction in a federal district court against the conduct complained of. Such injunctions are granted almost automatically. And the General Counsel, of course, issues complaints whenever he has reasonable cause to believe that a violation has been committed. The net effect of the uncertainty in the law, therefore, is that grounds for a complaint—and thus for an injunction—exist in almost every case. A favorable decision peached years later, long after the strike has been settled or broken, hardly compensates the union for the deprivation of what, belatedly, is held to be its statutory right. The experience in this case,

Ward & Co. v. Northern Pacific Terminal Co., 128 F. Supp. 475 (D. Ore. 1953); *Minneapolis & St. L. Ry. v. Pacific Gamble Robinson Co.*, 215 F. 2d 126 (8th Cir. 1954).

in which an injunction was issued almost immediately, and the strike broken soon afterward, illustrates the point.

Moreover, a union which violates Section 8(b)(4) can be sued in damages under Section 303 of the Act, 29 U.S.C. 187. Such damages can be astronomical in amount. Surely, the same law which imposes such heavy financial liability on unions ought at least to make clear what their obligations are.

No area of the law can be completely clear, completely predictable. But this case presents this Court with an opportunity to clarify at least one vitally important area of the law which is of central importance to the federal labor policy and to those who are governed by it, and which, as a result of the decision below, is in a state of total conflict and confusion.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

DAVID E. FELLER

ELLIOT BREDHOFF

JERRY D. ANKER

MICHAEL H. GOTTESMAN

1001 Connecticut Avenue, N. W.

Washington 6, D. C.

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 198—September Term, 1961
(Argued February 5, 1962 Decided October 18, 1962)
Docket No. 27079

CARRIER CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Before:

LUMBARD, *Chief Judge,*
SWAN AND WATERMAN, *Circuit Judges.*

Petition by employer to review and modify order of the National Labor Relations Board, 132 N.L.R.B. No. 17, dismissing charges that union had violated §§ 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act by picketing gate to railroad right of way adjacent to employer's premises while the railroad was performing services incident to the normal operations of the employer.

Petition granted.

THEOPHIL C. KAMMHOlz, Chicago, Illinois (Kenneth C. McGuiness, Washington, D. C., David W. Jasper and John E. Lynch, Syracuse, New York, on the brief) *for petitioner.*

MELVIN J. WELLES, National Labor Relations Board, Washington, D. C. (Stuart Rothman, General Counsel, Dominick L. Manoli, Assoc. General Counsel, Marcel Mallet-Prevost, Asst. General Counsel and Hans J. Lehmann, on the brief) *for respondent.*

JERRY D. ANKER, Washington, D. C. (David E. Feller and Feller, Bredhoff & Anker, and Thomas P. McMahon, Buffalo, New York, on the brief) *for United Steelworkers of America, AFL-CIO, and its Local Union 5895, interveners.*

GERALD E. DWYER, New York, N. Y., and GREGORY S. PRINCE, PHILIP F. WELSH and CARL V. LYON, Washington, D. C., on the brief *for Association of American Railroads, amicus curiae.*

WATERMAN, Circuit Judge:

On March 2, 1960, members of Local 5895, United Steel Workers of America, went on strike against Carrier Corporation. Carrier's plant is located in Syracuse, New York, and a substantial amount of its products are shipped from there in interstate commerce. Upon instituting the strike pickets were maintained at numerous entrances to the Carrier plant. A picket line was also established at a gate, described more fully hereafter, on a right of way owned by the New York Central Railroad. Based on charges by Carrier, the Board filed a complaint against the Union and its officers, alleging violations of §§ 8(b)(1)(A), 8(b)(4)(i) and 8(b)(4)(ii)(B) of the National Labor Relations Act. A hearing was held upon the complaint and the Trial Examiner found that the picketing violated § 8(b)(1)(A) of the Act. The Board entered an order on July 13, 1961, requiring the union to cease and desist from the violation and to take other appropriate action. The union does not con-

test this portion of the order, and a consent decree providing for its enforcement has been entered.¹

The Trial Examiner also found that the picketing on the railroad right of way constituted a violation of §§ 8(b)(4)(i) and 8(b)(4)(ii)(B) of the Act, but the Board held, one member dissenting, that those sections had not been violated. By its petition in this court, Carrier seeks modification of this latter portion of the decision and order of the Board. The Association of American Railroads, as amicus curiae, has filed a brief supporting Carrier's petition. Local 5895 has intervened in support of the Board's position.

The question for decision is whether it is a violation of §§ 8(b)(4)(i) and of (ii)(B) for a union to picket a railroad right of way adjacent to the employer's premises, when it is the manifest objective of such picketing to prevent employees of the railroad from handling the goods of the struck employer in the course of regular delivery and removal operations. In agreement with the Trial Examiner and the dissenting member of the Board, we hold that it is.

The facts, as stated by the Board, are as follows:

"As described in more detail in the Intermediate Report, the Carrier plant was bounded on the west by Thompson Road, and immediately south of the plant and extending in an east-west lateral was a spur of the New York Central, running easterly from the Lake Line of the railroad across Thompson Road. This spur was used to serve Carrier and other plants in the adjacent area. The railroad right-of-way, *which was owned by the railroad*, was enclosed by a chain link fence along its south boundary, which fence was a continuation of one enclosing Carrier property along Thompson Road. Access to the right-of-way was provided by a chain link gate immediately east of the point

¹ It is unnecessary to refer further to this portion of the Board's order.

where the spur crossed Thompson Road.² On March 11, pursuant to arrangements made with Carrier the previous day, the railroad, under the operation of supervisory personnel, undertook to 'spot' 14 empty box-cars at the Carrier plant and pick up a like number of loaded cars. In carrying out this work, the train made several passages through the Thompson Road gate, and it was at this point that the conduct complained of took place. The Trial Examiner found that by maintaining pickets at the Thompson Road railroad gate, by threatening railroad personnel, and by blocking the train's passage with the object of forcing or requiring the New York Central to cease handling or transporting Carrier products and otherwise doing business with Carrier, the Respondents violated Section 8(b)(4)(i) and (ii)(B) of the Act."

Section 8(b)(4) of the National Labor Relations Act, as amended by 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4), is one of the provisions of the Act directed against secondary boycotts. *NLRB v. Denver Building and Const. Trades Council*, 341 U. S. 675, 686 (1951). Its purpose is to prevent the enlargement of labor disputes which occurs when a neutral bystander is enmeshed in a controversy not his own. To this end, unions are prohibited from bringing certain pressures to bear on neutral employers and their employees, pressures which have as their goal that of forcing these secondary parties to break off business relations with the primary employer. The language of the Act is broad enough to apply whether the forbidden objective is brought about directly, as by interference with suppliers or

² The Trial Examiner's findings show that this gate was padlocked when not opened for railroad switching operations. Railroad personnel held the key to the gate, which could also be opened by a master key, held by Carrier employees, to locks on Carrier property. Carrier employees were not permitted to use this gate to get access to the Carrier plant.

customers of a struck employer, *Local 1976, United Brotherhood of Carpenters and Joiners v. NLRB*, 357 U. S. 93 (1958), or indirectly, as by interference with third party suppliers or customers of a neutral employer who, by these pressures, is forced to break off dealings with the primary employer. *United Brotherhood of Carpenters and Joiners (Wadsworth Building Co.)*, 81 N.L.R.B. 802 (1949).

Section 8(b)(4) makes it an unfair labor practice for a union:

(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * * *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing * * *

³ Prior to the amendment of Section 8(b)(4) in 1959, the substantive provisions of Section 8(b)(4)(B) were found in Section 8(b)(4)(A) of the Taft-Hartley Act, which reads as follows:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) to engage in, or to induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles,

It is clear that the activities here in question violate the statute if the statute is read literally. Since the earliest days of the Taft-Hartley Act, however, these sections and their predecessor section prior to the 1959 amendments, § 8(b)(4)(A), have received a complex interpretive gloss. "Section 8(b)(4) must be interpreted and not merely read literally." *Seafarers Int'l Union, etc. v. NLRB*, 265 F. 2d 585, 591 (D. C. Cir. 1959). "This provision could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary activity." *Local 761, Int'l Union of Electrical, Radio & Machine Workers v. NLRB*, 366 U. S. 667, 672 (1961).

The basic difficulty one encounters with a literal reading is that traditional picketing around the premises of an employer with whom a union has a dispute almost inevitably involves some interference with the relations between that employer and his suppliers or customers. "A strike, by its very nature, inconveniences those who customarily do business with the struck employer." *Oil Workers Int'l Union (Pure Oil Co.)*, 84 N.L.R.B. 315, 318 (1949). "The cases recognize the very practical fact that, intended or not, sought for or not, aimed for or not, employees of neutral employers do take action sympathetic with strikers and do put pressure on their own employers." *Seafarers Int'l Union, etc. v. NLRB*, 265 F. 2d 585, 590 (D. C. Cir. 1959). Thus,

materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. 61 Stat. 136 (1947).

All of the cases cited in this opinion have dealt with labor practices which occurred prior to the 1959 amendments. We do not consider this fact to be material however, since both the purpose and effect of the amendment would appear to be that of *strengthening* rather than *weakening* the Act's proscriptions against secondary boycott activities.

"[i]t is clear that, when a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all persons will honor the picket line, and that hope encompasses the employees of neutral employers who may in the course of their employment (deliverymen and the like) have to enter the premises." *Id.* at 591.

Moreover, it was clear from the legislative history of the Act and was made explicitly clear by the 1959 amendments that Congress did not, by § 8(b)(4), intend to outlaw traditional primary strike activity or traditional methods of picketing.

To accommodate the apparent conflict between the literal language of the statute on the one hand, and, on the other, the Congressional purpose, the Board and the courts have evolved the "primary-secondary activity" distinction. The line that has been drawn between the two kinds of activity has been uncertain and wavering, involving distinctions "more nice than obvious." *Local 761, Int'l Union of Electrical, Radio & Machine Workers, supra*, at 674. What is worse, the conceptual dichotomy has been ambiguous. In some cases decision as to whether union activity was "primary" or "secondary" has turned on whether the activity was encompassed within a literal reading of the act or affected secondary employers, and it was immaterial to the result whether the activity was, in the end, held to be unlawful under § 8(b)(4). *NLRB v. Business Machine & Office Appliance Mechanics Conference Board (Royal Typewriter Co.)*, 228 F.2d 553 (2 Cir. 1955), *cert. denied*, 351 U. S. 553. In other cases, the labels "primary" and "secondary" were purely conclusionary appellations, the choice of label turning upon whether a particular activity or complex of activities was ultimately held to violate, or to be immune from, the proscriptions of § 8(b)(4). *Int'l Brotherhood of Teamsters, Local 807 (Schultz Refrigerated Service)*, 87 N.L.R.B. 504 (1949). In all events, where picketing was limited to the premises of the primary em-

ployer, the Board and the courts, by adopting this distinction between primary and secondary activities, exempted from the proscription of § 8(b)(4) many activities covered by the subsection's literal language. *United Electrical, Radio and Machine Workers (Ryan Construction Corp.)*, 85 N.L.R.B. 417 (1949); *DiGiorgio Fruit Corp. v. NLRB*, 191 F. 2d 642 (D. C. Cir. 1951); *Milwaukee Plywood Co. v. NLRB*, 285 F. 2d 325 (7 Cir. 1960); cf. *Local 761, supra*. These cases are not dispositive of the issue before us, inasmuch as here the union's activities took place not on the premises of the Carrier Corporation but on an adjacent right of way owned by the New York Central Railroad.

However, exceptions to a literal reading of the proscriptions of § 8(b)(4) have not been limited to cases of picketing on the premises of the primary employer. Occasionally, the job site in relation to which a dispute arises is located on the premises of a neutral third party. In such circumstances the unions involved have claimed their traditional right to picket at the job site. To deal with this class of cases the Board has utilized a "situs of the dispute" concept. Although the situs of the dispute is normally at the premises of the primary employer, an application of this concept permits extension, in appropriate circumstances, of traditional union activity to neutral construction sites, *NLRB v. Denver Building & Const. Trades Council*, 341 U. S. 675 (1951), to ambulatory vehicles in the trucking industry, *Int'l Brotherhood of Teamsters, Local 807 (Schultz Refrigerated Service)*, *supra*, or to a ship moored at the dry dock of a neutral employer, *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547 (1950). Within limitations to be discussed hereafter, picketing at such places has, in some cases, been held lawful under the act, even though incidental injury has been suffered by neutral employers occupying the common situs. But these "common" or "ambulatory" situs cases are no more dispositive of the issue before us than are those cases involving the picketing

of the primary employer's premises, for no employee of Carrier Corporation worked on the railroad right of way either before or during the strike.

Indeed, we find no controlling authority to enlighten us, and, absent controlling authority, we must find our decisional guidelines behind the disparate facts of prior dissimilar cases. In doing so, we are mindful of the warning of the Supreme Court in *Local 1976, United Brotherhood of Carpenters & Joiners v. NLRB*, 357 U. S. 93, 99-100 (1958):

"It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy against secondary boycotts as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment into enacted law."

We are aware, no less, that "[t]he nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer." *Local 761, supra* at 674. Nevertheless, distrust of quick formulae does not lead us to the opposite evil of overreliance upon finely spun factual distinctions having no basis in legislative history or in reason. Ours is the task of principled decision and Congress could have intended no less when it enacted the statute and placed upon us the duty to review orders of the Board thereunder.

Relevant prior constructions of § 8(b)(4) can best be understood, perhaps, when divided into two time periods,

I.

The first period, beginning with the enactment of the Taft-Hartley Act in 1947, and terminating in 1952, may be characterized by relatively narrow constructions of § 8(b)(4) by the NLRB. The cases may be further subdivided into those involving picketing at the premises of the primary employer and those involving picketing at neutral premises.

From the earliest cases, the Board ruled that all picketing at the premises of the primary employer was immune from the proscriptions of § 8(b)(4)(A). Relying on the legislative history rather than the language of the statute, the Board maintained this position, even when it was clear that the picketing could have no appeal but to employees of neutral employers. Thus, in *United Electrical, Radio and Machine Workers (Ryan Construction Corp.)*, 85 N.L.R.B. 417 (1949), the union, in support of its dispute with the primary employer Bucyrus, picketed the entire Bucyrus premises, including a separate gate that had been cut through the fence to provide ingress for Ryan employees to the site of a construction project Ryan was performing for Bucyrus. Ruling that the activity was "primary picketing" outside the proscriptions of § 8(b)(4)(A), the Board stated that the provision "was intended only to outlaw certain secondary boycotts, whereby unions sought to enlarge the economic battleground beyond the premises of the primary employer. When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called 'secondary' even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons." *Id.* at 418. And see *Oil Workers Int'l Union (Pure Oil Co.)*, 84 N.L.R.B. 315 (1949).

Where picketing activities had taken place on neutral premises, the early cases were in substantial confusion. In some, the Board, still conceding the existence of the objec-

tive proscribed by the Act, attempted to carve out a new and broader geographical area of immunity based, now, on the notion of "the situs of the dispute," or "the area of primary conduct." Thus, in *Int'l Brotherhood of Teamsters, Local 807 (Schultz Refrigerated Service)*, 87 N.L.R.B. 504 (1949), Schultz had moved its place of business from New York City to New Jersey, replacing members of Local 807 by drivers from a New Jersey local. In ruling that the displaced drivers might picket around the trucks while they were being loaded or unloaded at the premises of New York City customers, the Board stated:

"Plainly, the object of all picketing at all times is to influence third persons to withhold their business or services from the struck employer. *In this respect there is no distinction between lawful primary picketing and unlawful secondary picketing proscribed by § 8(b)(4) (A)*. Necessarily then, one important test of the lawfulness of a union's picketing activities in the course of its dispute with an employer is the identification of such picketing with the actual functioning of the primary employer's business at the *situs* of the labor dispute." *Id.* at 505. (Emphasis added.)

Within this "area of primary conduct," therefore, the union could "lawfully persuade all persons, including in this case the employees of Schultz' customers and consignees, to cease doing business with the struck employer." *Id.* at 504. In *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547 (1950), the Board imposed limitations, in the form of the often-quoted "Moore Dry Dock Conditions," upon a union's right to picket at the situs of a dispute located on neutral premises:

"In the kind of situation that exists in this case, we believe that picketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times

when the *situs* of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer." *Id.* at 549.

The limitations were designed, once again, to prove less the issue of intent *under* the statute, however, than to isolate spatio-temporal areas of exemption *from* its operation. The rationale justifying this approach was the underlying intent of Congress, in enacting § 8(b)(4)(A), not to interfere with traditional "primary activities" of striking unions.

Although *Schultz* and *Moore Dry Dock* are consistent with the Board's approach to contemporaneous cases involving the picketing of a primary employer's premises, they are not easily reconciled with three closely-preceding "neutral" or "common-situs" Board decisions: *Local 74, United Brotherhood of Carpenters (I. A. Watson Co.)*, 80 N.L.R.B. 533 (1948); *Int'l Brotherhood of Electrical Workers, Local 501 (Samuel Langer)*, 82 N.L.R.B. 1028 (1949); and *Denver Building and Const. Trades Council*, 82 N.L.R.B. 1195 (1949). All three involved disputes concerning the use of non-union employees at construction sites. In the *Watson* case, the owner of certain premises contracted with members of the respondent union to renovate a dwelling. Subsequently, the owner contracted with the *Watson Co.*, an employer of non-union labor whom the respondent had unsuccessfully sought to organize in the past, to install wall and floor coverings in the project. When an officer of the respondent learned of the situation, he ordered members of the union off the job. In *Langer* and *Denver* the general contractors of construction projects were the ones who subcontracted portions of the jobs to employers of non-union men. The respondent unions again had had long-standing disputes with the errant subcon-

tractors in each case. When the construction sites were picketed, union employees of other subcontractors walked off the job. In each of these three cases the Board, without hesitation, found a violation of § 8(b)(4)(A), despite the fact that picketing was limited to the situs of the dispute and met the soon-to-be-announced Moore Dry Dock criteria for picketing neutral premises. Rather than relying on the primary-secondary activity distinction, the Board founded its complaint, in each case, upon the fact that an objective of the unions' actions was to force the general contractors in *Denver* and *Langer*, and the owner in *Watson*, to cancel their contracts with the subcontractor-employers of non-union men.

Toward the end of this first period,⁴ the Supreme Court, in four decisions handed down on June 4, 1951, took the opportunity to review the early Board interpretations of § 8(b)(4)(A). In *NLRB v. International Rice Milling Co.*, 341 U. S. 665 (1951), members of the International Brotherhood of Teamsters had picketed the premises of the Kaplan Rice Mills, Inc., for purposes of securing recognition of the

⁴ Two Board decisions during the period dealt with union activities at places which were neither the premises of the primary employer nor the situs of the dispute. In *Amalgamated Meat Cutters & Butcher Workmen (Western, Inc.)*, 93 N.L.R.B. 336 (1951) the Board ruled without hesitation that it was violative of § 8(b)(4)(A) for union members to go to the premises of neutral customers there to encourage their employees to refuse to handle the primary employer's meat products. In *Newspaper & Mail Deliverer's Union (Interborough News Co.)*, 90 N.L.R.B. 2135 (1950) however, where union members had gone to the premises of neutral suppliers to encourage their employees not to deliver newspapers to the primary employer's news stands, the Board found no violation on the ground that the conduct "invited action only at the premises of the primary employer." *Id.* at 2135. The union entreaties to neutral employees sought inaction, however, rather than action. That being the case, we find it anomalous to locate the response to the entreaties at one place rather than another. We are unable, thus, to distinguish *Interborough* from subsequent contrary Board rulings in *Western, Inc.*, *supra*, and *Chauffeurs, Teamsters & Helpers, Local 175 (McJunkin Corp.)*, 128 N.L.R.B. 522 (1960).

union as the collective bargaining representative of the mill employees. During the course of their picketing, the members sought to encourage the drivers of the truck of a neutral customer to refrain from entering the premises to pick up an order of goods. Citing *Oil Workers Int'l Union (Pure Oil Co.)*, *supra*, the Board had dismissed the complaint on the ground that the union's activities were merely "primary picketing" of the Kaplan mill and were carried out in the immediate vicinity of the mill. Although approving the Board's dismissal of the complaint, the Court rested its action upon a wholly different rationale from that enunciated by the Board in *Ryan* and *Pure Oil*:

"The limitation of the complaint to an incident in the geographically restricted area near the mill is significant, although not necessarily conclusive. The picketing was directed at the Kaplan employees and at their employer in a manner traditional in labor disputes. Clearly, that, in itself, was not proscribed by § 8(b)(4). Insofar as the union's efforts were directed beyond that and toward the employees of anyone other than Kaplan, there is no suggestion that the union sought concerted conduct by such other employees. 341 U. S. 671.

"A sufficient answer to this claimed violation of the section is that the union's picketing and its encouragement of the men on the truck did not amount to such an inducement or encouragement to 'concerted' activity as the section proscribes. *Id.* at 670.

"A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscriptions of § 8(b)(4), and they do not here. *Id.* at 671."

Although the Court's specific *ratio decidendi* in *Inter-*

national Rice was not to survive the 1959 amendments by which the requirement of § 8(b)(4) that "concerted" action be encouraged was eliminated,⁸ its basic approach to the case was to have profound effects upon subsequent constructions of the statute. No longer were there geographical areas exempted from the operation of § 8(b)(4). Analysis of the legitimacy of union activities was to proceed by an examination of *intent* or *objectives* when neutrals were threatened harm by a labor dispute not their own.

The remaining three cases decided by the Court on June 4, 1951, together with *International Rice*, furthered this analysis in the context of "common situs" picketing. In *NLRB v. Denver Building and Const. Trades Council*, 341 U. S. 675 (1951); *Int'l Brotherhood of Electrical Workers, Local 501 v. NLRB*, 341 U. S. 694 (1951); and *Local 74, United Brotherhood of Carpenters and Joiners v. NLRB*, 341 U. S. 707 (1951), the Court approved the Board's finding below of a violation of § 8(b)(4)(A) in *Denver, Langer and Watson*, respectively. In finding that the statute had been violated the centrality of the unions' objectives was emphasized:

"It was an object of the strike to force the contractor to terminate Gould & Preisner's subcontract.

"We hold * * * that a strike with such an object was an unfair labor practice within the meaning of § (b)(4)(A).

"It is not necessary to find that the *sole* object of the strike was that of forcing the contractor to terminate the subcontractor's contract. This is emphasized in the legislative history of the section.¹⁸

¹⁸ Senator Taft, sponsor of the bill, stated in his supplementary analysis of it as passed: "Section 8(b)(4), relating to illegal strikes and boycotts, was amended in conference by striking out the words 'for the purpose of' and inserting the clause 'where an object thereof is.'" 93 Cong. Rec. 6859."

⁸ See footnote 3, *supra*.

*Denver Building and Construction Trades Council,
supra at 689.*

Though these four decisions handed down by the Supreme Court on June 4, 1941, set the basic approach to subsequent constructions of the statute, fundamental problems still remained. To find a violation of § 8(b)(4) it was sufficient that an object of a union's actions was to interfere with business relations between the primary employer and neutral third parties. However, the Board had recognized, as Judge Prettyman stated some years later, that "when a union pickets an employer with whom it has a dispute, it hopes even if it does not intend, that all persons will honor the picket line, and that hope encompasses the employees of neutral employers who may in the course of their employment * * * have to enter the premises." *Seafarers Int'l Union etc. v. NLRB*, 265 F. 2d 585, 591 (D. C. Cir. 1959). It was clear, thus, that harm to neutral employers could be justified under the Act, not because the harm occurred at exempted locations, but only if it occurred as an incidental effect of the union's pursuit of legitimate strike objectives. *NLRB v. Service Trade Chauffeurs, Local 145*, 191 F. 2d 65, 67 (2 Cir. 1951). It remained (1) to identify the strike objectives which under the Act were legitimate as distinguished from hoped-for results which, if incidentally accomplished, could be permissible but which could not be independently pursued and (2) to establish evidentiary guidelines by which the true objectives of union activity could be ascertained in the absence of an admission of illegal intent.

II.

During the second of the time periods, 1952 to date, into which we have separated the decisions construing § 8(b)(4), substantial progress was made in solving the two problems mentioned above. Concomitant with that progress the stat-

ute received broader readings from the Board and the courts.

The leading case of the period was *Brewery and Beverage Drivers and Workers, Local 67 (Washington Coca Cola Bottling Works, Inc.)*, 107 N.L.R.B. 299 (1953). There, the respondent union, after calling a recognitional strike against Washington Coca Cola, picketed not only the plant, but the company's delivery trucks as they made their rounds to customers' premises. Although the activity appeared to comply with the four *Moore Dry Dock* criteria for picketing an ambulatory situs of dispute, and closely paralleled approved union activities in *Schultz Refrigerated Service, supra*, it was held by the Board to constitute a violation of § 8(b)(4)(A). Prior cases were distinguished on the ground, primarily, that in them, unlike in *Washington Coca Cola*, the primary employer had no permanent place of business at which the union could adequately publicize its dispute.

The rationale underlying this new limitation on neutral premises picketing was not immediately clear. What came to be known as the "*Washington Coca Cola* doctrine," however, was articulated in a series of Board decisions over the following seven or eight years. In *Int'l Brotherhood of Teamsters, Local 659 (Ready Mixed Concrete Co.)*, 116 N.L.R.B. 461 (1956), the Board found a violation of § 8(b)(4)(A) on facts closely similar to those in *Washington Coca Cola*. The Trial Examiner had stated, with the approval of the Board, that:

" * * * the Board in ambulatory situs situations, such as exist generally, in the transportation industry * * * has in effect added to the four expressed in *Moore Dry Dock*, a fifth condition and one that the Respondents' picketing * * * fails to satisfy. That fifth condition is substantially this: that such picketing at neutral premises (as of trucks of a primary employer while making deliveries to customers) will not

be regarded as privileged primary picketing absent a showing that the primary employer has in the vicinity no permanent establishment that may be picketed effectively. *Washington Coca Cola Bottling Works, Inc.*
* * *

Int'l Brotherhood of Teamsters, Local 659 (Ready Mixed Concrete Co.), 116 N.L.R.B. 461, 473 (1956).

The reason behind this fifth condition was stated by the Examiner as follows:

"Where, as in the *Schultz Refrigerated Service* case, *supra*, a primary employer has no fixed location in the vicinity where its employees may adequately be reached by picketing, then due regard for the right of the union to picket effectively * * * provides sufficient justification for permitting picketing of the primary employer at the location where the traveling work situs comes to rest, and any involvement of neutral employers and their employees may then appropriately be viewed as but a necessary incidental effect of lawful primary action * * *. But where, as here, the employer has a fixed place of business in the area of the dispute at which its employees can be and are approached with the identical message the Union would deliver to the same employees at the premises of the secondary employers, the scales tip the other way. For now, the only detriment the Union would suffer by forbidding extension of its picketing to customers' job sites while deliveries are being made would be the foreclosure of what otherwise would be an added opportunity to enlist the aid of others not directly concerned with its dispute." *Id.* at 474.

Although the *Washington Coca Cola* doctrine was first articulated in ambulatory situs cases, its rationale was extended to all cases threatening involvement of neutral em-

ployers and their employees. Thus, in *Retail Fruit and Vegetable Clerks Union, Local 1017 (Crystal Palace Market)*, 116 N.L.R.B. 858 (1956), the employer with whom the union was involved in a dispute owned a large market hall and operated several stands therein, leasing the remaining stands to neutral third parties. When a strike was called against the primary employer, the union was given permission to picket at the particular stands operated by him, but chose, rather, to picket at several general entrances to the market hall. In holding these activities outside the standards established for common situs picketing, and thus violative of § 8(b)(4), the Board stated: "In developing and applying these standards, the controlling consideration has been to require that the picketing be so conducted as to minimize its impact on neutral employers insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees." *Id.* at 859 (emphasis in original).

The principle underlying *Washington Coca Cola* was extended to reach picketing of the premises of a primary employer even when the premises did not harbor neutral employers or their employees. In *Chauffeurs, Teamsters and Helpers Local 175 (McJunkins Corp.)*, 128 N.L.R.B. 522 (1960), members of the striking union had picketed only one of ten entrances to the plant of the primary employer, that being a trucking entrance not normally used by employees of the plant. The Board held that action to be violative of § 8(b)(4) when combined with (1) the sending of "hot cargo" letters to neutral carriers with whom the primary employer dealt, and (2) one direct approach to neutral employees at their place of work requesting that they not handle the goods of the primary employer:

"Where a union * * * sets out on a concerted effort to keep neutral employers from doing business with the primary employer by encouraging and inducing the employees of those neutral employers, 'it would be

manifestly unrealistic not to take into consideration the total pattern of conduct' engaged in by the union when passing upon particular incidents of inducement. If the totality of the union's effort is intended to accomplish a proscribed objective by inducements of secondary employees, then each particular inducement, being a component part of that total effort, must be adjudged as unlawful. 128 N.L.R.B. at 525." (Footnotes omitted.)

The pattern thus becomes clear.

A. The roots of the *Washington Coca Cola* doctrine lay in the Supreme Court's insistence that the gravamen of any complaint under § 8(b)(4) is a union's pursuit of a *forbidden objective*.

B. The *legitimate* objectives of primary strike or picketing activity were identified. These were repeatedly stated to be "reaching the primary employees," *Crystal Palace Market, supra* at 859, "publiciz[ing] its labor dispute in a traditional way among employees primarily interested," *Ready Mixed Concrete Co., supra* at 474, "communicat[ing] to employees of the primary employer its picketing message," *Ibid.*⁶

C. Involvement of the employees of *neutral* employers was permissible only if merely incidental to the pursuit of a legitimate primary objective.

D. Most important, the doctrine required that picketing be conducted in such a manner and at such a place as to

⁶ It is obvious that some strike or picketing objectives lie fully outside the language of the section, which applies only to coercion of persons "engaged in commerce" or to inducement to "employees" in the course of their employment. It has been held, therefore, that union attempts to publicize a dispute to the general consuming public or directly to employers themselves (where the attempts are peacefully carried out) are immune from the proscriptions of the Act. *NLRB v. Business Machines & Office Appliance Mechanics, Local 459*, 228 F. 2d 553 (2 Cir., 1955), cert denied, 351 U. S. 553; *Rabbowin v. NLRB*, 195 F. 2d 906 (2 Cir., 1952); *Crowley's Milk Company, Inc.*, 102 N.L.R.B. 996 (1953).

minimize its impact on neutral employees insofar as this could be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees. Actions beyond that minimum were to be interpreted as a pursuit of objectives forbidden by the Act and thus violative of its provisions.

The relevance of these principles to the issue before us is clear. In picketing the railroad right of way adjacent to the Carrier plant, the union was not furthering its legitimate objective of publicizing its dispute to Carrier employees. Eight gates on the employer's premises existed, and were picketed, for this purpose. Carrier employees were not permitted access to the plant through the gate on the railroad right of way. In picketing on the railroad right of way the union demonstrated that its manifest, and sole, objective was to induce or to encourage railroad employees, or to coerce the railroad, to refuse to handle Carrier goods or otherwise to deal with the primary employer. Such results, although permissible when merely incidental to the pursuit of legitimate objectives, *DiGiorgio Fruit Corp. v. NLRB*, 191 F. 2d 642 (D. C. Cir., 1951), here involved no such redemptive feature. The actions of the union were thus in violation of §§ 8(b) (4) (i) and (ii) (B) of the Act.

III.

Where the picketing of neutral or secondary premises has been at issue, the courts of appeals have repeatedly ruled in a manner consistent with the principles set forth above. See, e.g., *NLRB v. United Steelworkers of America, Local 5246*, 250 F. 2d 184 (1 Cir., 1957); *NLRB v. General Drivers, Salesmen, Warehousemen & Helpers, Local 984*, 251 F. 2d 494 (6 Cir., 1958); *Brewery Drivers Union v. NLRB*, 220 F. 2d 380 (D. C. Cir., 1955); *NLRB v. Associated Musicians, Local 802*, 226 F. 2d 900 (2 Cir., 1955).

In *Seafarers International Union v. NLRB*, 265 F. 2d 585 (D. C. Cir., 1959), however, the Court of Appeals for

the District of Columbia Circuit denied enforcement of an order of the Board which was clearly required by these principles. The union's dispute in that case was with Salt Dome, the operator of a ship used in offshore oil drilling in the Louisiana tidelands of the Gulf of Mexico. When the ship was taken to the neutral Todd shipyard for overhaul and repairs, members of the union began picketing outside the shipyard gates. (They had been denied the right to picket on the wharf immediately alongside the vessel.) Two days after the picketing began, Salt Dome removed all its non-supervisory employees from the ship; the picketing continued, however, for more than a week thereafter. As a result of this activity employees of the Todd shipyard refused to work on the Salt Dome vessel although they continued with other work about the yard. The Board ruled that by picketing after the removal from the ship of all Salt Dome's non-supervisory employees, the union revealed that its actions were directed not to fellow employees of Salt Dome, but to the neutral employees of Todd.

In reversing the Board's finding of a § 8(b)(4) violation upon these facts, the Court agreed that "the question is the objective. In the case at bar, if the objective of the strike encompassed Salt Dome only, it was legal. If its objective was partly Todd or its employees, it was illegal. The difference is in whether the effect on Todd's workers was an objective of the strike or was merely an incident of it" 265 F. 2d at 590. The court introduced a new test, however, for determining, in the absence of admissions by the union of an illegal intent, the objectives of picketing elsewhere than on the primary employer's premises:

"Here Todd, the unoffending employer, bore no more adverse effects than it would have suffered had it been working on the Pelican [Salt Dome's ship] at a dock owned by Salt Dome several miles away and had the picketing been at that dock. If such had been the case, Todd's employees would have refused to cross the

line in order to work on the Pelican * * *. Such picketing would undoubtedly have been legal. *Since the picketing in the case at bar cast upon Todd no greater adverse effect than would thus have been the case, its interest in preventing the picketing was not as great as the employees' interest in picketing what was the situs of the dispute.*" *Id.* at 592. (Emphasis added.)

"* * * Todd was under economic pressure * * *. But this pressure was the same sort as that felt by an employer when one of his major suppliers or customers is being picketed, or that which a contractor feels when a subcontractor is struck at a crucial point in construction." *Id.* at 591.

As we read the dissenting opinion, our colleague relies upon this same argument in the case before us. "It is * * * clear from the record that the picketing employees made no attempt to interfere with any of the railroad's operations for plants other than Carrier. The railroad employees were not encouraged to, nor did they, refuse to serve the other plants. The picketing was designed to accomplish no more than picketing outside one of Carrier's own delivery entrances might have accomplished." To our minds, the crucial fallacy in this argument lies in the failure to distinguish between fully legitimate objectives of a union in picketing a primary employer's premises, and those hoped-for results which are not permissible unless only incidentally achieved.

It is clear that where a union engages in traditional picketing activities on the premises of the employer with whom it has a dispute, its actions may lawfully have the effect of encouraging employees of neutral suppliers or customers not to enter the premises. *Di Giorgio Fruit Corp. v. NLRB*, 191 F. 2d 642 (D. C. Cir., 1951). The cases have uniformly held, however, that such attempts to influence neutral employees are lawful only if incidental to the independently legitimate objective of publicizing the union's

dispute with the primary employer to the employees of that employer. After all, the language found in a statute is not wholly irrelevant to its proper construction. Because a harm may be permitted in one instance only because incidental to lawful activities, it is fallacious reasoning to hold that the same harm must be permitted in another instance where it is independently pursued. Neither logic nor the sense of the different economic situations indicates that such a result is justified. Insofar as the decision in *Seafarers International Union v. NLRB*, *supra*, rests upon a line of reasoning we cannot accept, we find the case unpersuasive. Though the statute may permit economic harm to be suffered by a neutral when a union, in the progress of aggressively pursuing lawful objectives, incidentally occasions that harm, it does not follow that economic harm suffered by a neutral independently occasioned by aggressive union activity, is also permissible under that statute.

Finally, counsel for the Board place great reliance upon the recent decisions of the Supreme Court in *Local 761, International Union of Electrical, Radio & Machine Workers (General Electric Co.) v. NLRB*, 366 U. S. 667 (1961). There, as in the *Ryan* case, *supra*, the union had picketed several entrance gates to the plant of the primary employer. One of these gates was used exclusively by employees of independent contractors who were utilized to perform various tasks on the premises. Although remanding the case for further findings of fact by the Board, the Court held such picketing of a separate gate to be violative of § 8(b)(4) so long as the independent workers were "performing tasks unconnected to the normal operations of the struck employer." *Id.* at 680. And see *United Steelworkers v. NLRB*, 289 F. 2d 591 (2 Cir., 1961).

The Court's holding in *General Electric* does not, of course, conflict with the result we here reach. In both cases union picketing activities are held to violate § 8(b)(4) of the Act because of their appeal to neutral employees. In

General Electric, the picketing took place at the premises of the employer with whom the union was engaged in a dispute. The Supreme Court limited its finding of illegality, therefore, to circumstances in which the neutral employees were not engaged in work connected with the normal operations of the plant. In so limiting its holding the Court acknowledged the special solicitude of Congress and the Board that the statute not unduly restrict traditional picketing at the premises of the primary employer. *Local 761 (General Electric)*, *supra*, at 679, 681.

In this case, however, the union activity occurred on the right of way of the New York Central Railroad. No special policy of greater latitude for picketing at the primary employer's premises thus comes into play, and no distinction based on the work performed by the neutral employees need be made.

We do not find in *General Electric* a policy of the Supreme Court to exempt from the Act's proscriptions all union attempts to keep deliveries from being made to a struck plant, wherever and however such attempts are made. Yet it is this position for which the Board now earnestly contends. Were we to accept such a doctrine, however, we should not be able to distinguish attempts to prevent deliveries from attempts directly to interfere with other business relations between the struck employer and his suppliers or customers. Congress might have written § 8(b)(4) to apply only to union interference with business relations between a struck employer's suppliers and customers and *their* suppliers and customers. It did not do so, nor have the courts failed to find violations of the Act where union activities directly interfered with relations between a struck employer and secondary parties dealing with him. See, e.g., *Local 1976, United Brotherhood of Carpenters (Sand Door & Plywood Co.) v. NLRB*, 357 U. S. 93 (1958):

We do not read *Local 761 (General Electric Co.) v.*

NLRB, supra, to conflict with our disposition of the case at bar.

The petition of Carrier Corporation is granted.

SWAN, Circuit Judge:

I concur in the result of Judge Waterman's opinion.

LUMBARD, Chief Judge—Dissenting:

This case presents the question whether it is an unfair labor practice, prohibited by §§ 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, for a union to picket a railroad right of way adjacent to the employer's premises, while the railroad is engaged in normal delivery and removal operations in the behalf of the struck employer, if there is no point of entry into the latter's premises where the union can conduct such picketing. I would hold that picketing under such circumstances is not an unfair labor practice; accordingly, I dissent from the action of my colleagues in granting the employer's petition to modify the Board's order.

As I understand the cases in this area, the lawfulness of picketing depends on the legitimacy of the union's objective; the place where the picketing occurs is controlling only insofar as it sheds light on the union's objective. The legitimate objectives of picketing include publicizing a dispute to employees of neutral employers who are performing part of the everyday operations of the struck employer. Since the picketing which occurred here had that objective, and since there was no other place where the union could conduct such picketing, I agree with the National Labor Relations Board that there was no violation of the Act.

The railroad gate which was the locus of the disputed picketing affords access from Thompson Road, a public thoroughfare, to a right of way owned by the New York Central. The right of way is approximately thirty-five feet wide, and extends in an east-west direction along the south-

ern boundary of the Carrier plant, which fronts on the eastern side of Thompson Road. New York Central maintains railroad tracks on the right of way which by a series of spurs service Carrier and several adjacent plants also east of Thompson Road. The gate was cut into a fence which surrounded the railroad's property on its southern boundary and was a continuation of a fence enclosing the Carrier plant along Thompson Road. It was padlocked when not open for railroad switching operations. Railroad personnel held the key to the gate, which could also be opened by a master key, held by Carrier employees, to locks on Carrier property.¹ Carrier employees were not permitted access to the Carrier plant through the gate and right of way.

During the early days of the strike, the railroad provided regular service to the other plants located along the right of way. On March 10, about one week after the strike had commenced, Carrier made arrangements with New York Central for it to "spot" fourteen empty boxcars at the Carrier plant and remove the same number of loaded cars on the following day. On March 11, after the regular train crew had completed switching operations for other plants, supervisory personnel of the railroad who were willing to disregard the picket line took over the running of the train and started to perform the Carrier operations, which necessitated several switching maneuvers through the Thompson Road gate and onto Thompson Road. In the course of these operations, the striking Carrier employees congregated on Thompson Road outside the railroad gate, threatened railroad personnel running the train, and obstructed its passage by standing or lying in front of it and driving an automobile onto the track. These are the acts which Carrier claims were violations of §§ 8(b)(4)(i) and (ii)(B).

Section 8(b)(4) of the N.L.R.A. as amended by 73 Stat.

¹ The right of way had been owned by Carrier, which deeded it to New York Central in 1949.

542⁰ (1959), 29 U.S.C. § 158(b)(4), makes it an unfair labor practice for a union

“(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * * *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. * * *

It is evident that the acts complained of are covered by the terms of clauses (i) and (ii). It is equally plain that the objective of the striking Carrier employees was to prevent the railroad from performing its usual services for Carrier. However, the acts constituted “primary picketing” which is protected by the proviso in clause (B).

That primary picketing is not an unfair labor practice was first made explicit in the N.L.R.A. by the 1959 amendments to that Act. Before that time, § 8(b)(4)(A), the predecessor of the present provisions, if construed literally would have prohibited much picketing that lay within the domain of traditional union economic warfare. To avoid that result, unintended by Congress, § 8(b)(4)(A) was held to prohibit only “secondary” activity directed at someone

other than the employer with whom the union had a grievance. The incidental coercive effects felt by a neutral employer when his employees refuse to cross a picket line were declared outside the statutory prohibition. See *Oil Workers International Union (The Pure Oil Co.)*, 84 N.L.R.B. 315 (1949); *United Electrical, Radio & Machine Workers (Ryan Construction Corp.)*, 85 N.L.R.B. 417 (1949); *NLRB v. International Rice Milling Co., Inc.*, 341 U. S. 665; *NLRB v. Local 294, International Brotherhood of Teamsters*, 284 F. 2d 887 (2 Cir., 1960).

But although a distinction between primary and secondary picketing was drawn, no ready criteria for differentiating the two were available. The problem did not yield to a "quick, definitive formula," but rather required the development of standards "on the basis of accumulating experience." *Local 761, International Union of Electrical, Radio & Machine Workers v. NLRB*, 366 U. S. 667, 674 (1961). In the first cases, the touchstone of decision was ownership² of the picketed premises. Picketing at a secondary employer's premises was held unlawful. E.g., *United Brotherhood of Carpenters (Wadsworth Building Co.)*, 81 N.L.R.B. 802 (1949), enforced, 184 F. 2d 60 (10 Cir., 1950), cert. denied, 341 U. S. 947 (1951). Picketing at the primary employer's premises was allowed, even if it occurred at a gate reserved for the exclusive use of employees of a neutral contractor doing construction work on the premises: *Ryan Construction Corp., supra*. In *Ryan*, the Board said: "When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called 'secondary'. * * *" *Id.* at 418. See also *The Pure Oil Co., supra*.

This simple ownership test of union objective proved too inflexible. Situations arose in which due regard for the

² "Ownership" in this context, here and elsewhere in the opinion, refers not only to absolute legal title, but also to the occupation of premises through some legal right less than absolute ownership.

union's right to use its traditional weapons, including the inducement of neutral employees to support a strike by respecting picket lines, required that picketing be permitted elsewhere than at the primary employer's premises. In *International Brotherhood of Teamsters (Schultz Refrigerated Service, Inc.)*, 87 N.L.R.B. 502 (1949), the Board ruled that truckdriver employees could picket the primary employer's trucks when replacement drivers were loading or unloading them on or in front of customer's premises. In the Board's view, such picketing was primary activity because "in view of the roving nature of its business, [this was] the only effective means of bringing direct pressure on" the employer. *Id.* at 506. The employees were "acting in a manner traditional to employees in all other industries, who choose to stand before their place of employment and point out their replacements to the interested public as strikebreakers, and their employer as unfair." *Id.* at 507. In *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547 (1950), the Board upheld picketing of a neutral employer's shipyard where the struck employer's ship was undergoing construction work, the union having requested and been refused permission to place pickets at the dock where the primary employer's ship was berthed. At the same time, in order to protect "the right of a secondary employer to be free from picketing in a controversy in which it is not directly involved," the Board laid down standards to be applied in these "common situs" cases. *Id.* at 549. The effect of these standards was to confine the picketing as narrowly as possible to the normal operations of the primary employer and to require the union to make plain that it had no dispute with the neutral employer.³

³ Picketing the premises of a secondary employer was declared to be "primary" if the following conditions were met: "(a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the

By parity of reasoning it was held in other cases that the mere fact of ownership by the primary employer would not justify picketing which unreasonably interfered with the rights of neutral employers. In *Local 55 (PBM)*, 108 N.L.R.B. 363, enforced 218 F. 2d 226 (10 Cir., 1954), the Board found a violation of § 8(b)(4)(A) when a union picketed a construction site owned by a general contractor on which employees of neutral subcontractors were working, because the union did not make clear that its dispute was solely with the general contractor. The Board said: " * * * [T]he fact that the picketing takes place at the situs of the primary employer's regular place of business rather than at an ambulatory situs is not controlling; in both situations, picketing at a common situs is unlawful if the picketing sign fails to disclose that the dispute is confined to the primary employer." *PBM, supra*, at 366. (Footnote omitted.) In *Retail Fruit & Vegetable Clerks' Union (Crystal Palace Market)*, 116 N.L.R.B. 856 (1956), enforced 249 F. 2d 591 (9 Cir. 1957), the Board stated explicitly that the standards developed in *Moore Dry Dock* for common situs cases applied without regard to the ownership of the premises. It said: "We can see no logical

picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer." *Moore Dry Dock, supra*, at 549. (Footnotes omitted.) Later Board decisions made explicit a further condition which, at least as a relevant factor, was implicit in the rationale which underlay the *Dry Dock* standards; it must be shown that there was no reasonable opportunity for the union to accomplish its lawful objectives by picketing the premises of the primary employer. See *Brewery & Beverage Drivers (Washington Coca Cola Bottling Works, Inc.)*, 107 N.L.R.B. 299 (1953), affirmed, 220 F. 2d 380 (D. C. Cir., 1955); *International Brotherhood of Teamsters (Ready Mixed Concrete Co.)*, 116 N.L.R.B. 461, 473 (1956). Still later, the Board declared that failure to meet this condition was not conclusive but was only "one circumstance among others, in determining an object of the picketing." *International Brotherhood of Electrical Workers (Plauché Electric, Inc.)*, 135 N.L.R.B. No. 41 (1962). See also *NLRB v. Local 294, International Brotherhood of Teamsters*, 284 F. 2d 887 (2 Cir., 1960).

reason why the legality of such [common situs] picketing should depend on title to property. The impact on neutral employees of picketing which deviates from the standards outlined above is the same whether the common premises are owned by their own employer or by the primary employer." *Crystal Palace Market, supra*, at 859.

A related development was the reversal of the rule announced in *Ryan, supra*, pertaining to separate gate cases. In *Crystal Palace Market*, the Board overruled *Ryan* to the extent that it was inconsistent with the later case. *Id.* Thereafter, in *United Steelworkers v. NLRB*, 289 F. 2d 591 (2 Cir. 1961), we granted enforcement of a Board order finding a violation of § 8(b)(4)(A) in the picketing of a separate gate to the primary employer's premises, which gate was used exclusively by employees of neutral contractors doing construction work. The conditions which justified the finding of a violation were stated:

"There must be a separate gate marked and set apart from other gates; the work done by the men who use the gate must be unrelated to the normal operations of the employer and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations." *Id.* at 595.

This development of the distinction between primary and secondary picketing was reviewed and approved by the Supreme Court in *Local 761, International Union of Electrical, Radio & Machine Workers v. NLRB*, 366 U. S. 667 (1961), a separate gate case similar to *United Steelworkers v. NLRB, supra*. General Electric maintained a separate gate to its premises for the use of employees of independent contractors doing a variety of tasks including construction and maintenance work. During a strike against General Electric, pickets were placed at this gate as well as other plant entrances. The Board held that by picketing a gate

used only by employees of neutral employers, the union had violated § 8(b)(4)(A). The Supreme Court approved the tests laid down in *United Steelworkers*, and remanded the case to the Board for a determination whether the workers using the gate "performed conventional maintenance work necessary to the normal operations of General Electric." *Local 761, supra*, at 682.

In reaching its decision, the Court noted that its holding "would not bar the union from picketing at all gates used by the employees, suppliers, and customers of the struck employer." *Id.* at 680. The Court said:

"The Union claims that, if the Board's ruling is upheld, employers will be free to erect separate gates for deliveries, customers, and replacement workers which will be immunized from picketing. This fear is baseless. The key to the problem is found in the type of work that is being performed by those who use the separate gate. It is significant that the Board has since applied its rationale, first stated in the present case, only to situations where the independent workers were performing tasks unconnected to the normal operations of the struck employer—usually construction work on his buildings. In such situations, the indicated limitations on picketing activity respect the balance of competing interests that Congress has required the Board to enforce. On the other hand, if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations." (Footnote omitted.) *Id.* at 680-81.

The pattern which emerges from these cases requires affirmance of the Board's ruling. It is true that none of them precisely anticipates the facts here. This case does not involve a common situs, since none of Carrier's em-

ployees worked on the New York Central premises. But so long as the picketing is strictly confined to the objectives which justify picketing a neutral employer's premises in common situs cases and involves no greater interference with the neutral employer than is involved there, I see no reason why the picketing should be labeled "primary" in one case and not in the other. Where there is not a common situs, the picketing is not necessary to publicize the dispute to the employees of the primary employer. But as the Supreme Court explicitly recognized in *Local 761*, it is as legitimate a union objective to publicize the dispute to neutral employees making deliveries and performing other ordinary services for the primary employer as it is to publicize it to his own employees. Nor is this the case hypothesized by the Supreme Court in *Local 761*, where the primary employer has established a separate delivery gate leading onto his own premises. But the controlling issue being always whether the union's objective was one within the traditional scope of primary picketing, I see no more reason to accept as conclusive an ownership test when it works against the union than when it works in its favor, if other facts point to a contrary result.

The majority's decision rests on the premise that the only lawful objective of picketing is to reach the employees of the primary employer. I am totally unable to square this with the Supreme Court's statement in *Local 761*, *supra*, that "appealing to neutral employees whose tasks aid the employer's everyday operations" is "traditional primary activity." *Id.* at 681. The majority denies that there is a conflict, saying that "in both cases union picketing activities are held to violate § 8(b)(4) of the Act because of their appeal to neutral employees." But the Supreme Court stated, again explicitly, that the picketing was not unlawful if, as here, it reached neutral employees who performed work "necessary to the normal operations" of the employer. *Id.* at 682.

The sole basis of distinguishing this case is that the gate

involved here did not lead immediately to the primary employer's premises. Nowhere in the opinion in Local 761 can I find the "special solicitude" for picketing the premises of a primary employer which the majority finds, except insofar as the location of the picketing indicates its motive. So far as I can see, the majority's distinction between "fully legitimate objectives of a union in picketing a primary employer's premises, and those hoped-for results which are not permissible unless only incidentally achieved" is one of those "finely spun factual distinctions having no basis in legislative history or in reason" which the majority condemns. What the alleged distinction comes down to is that the union can seek to influence neutral employees at the premises of the primary employer and not elsewhere (which in this case means, of course, that it cannot use pickets to influence the railroad workers at all). But this makes the test not the union's objective but the location of the picketing, a test which the majority itself admits to be obsolete.

Of course the question of ownership will usually be of great significance. Legitimate union objectives can ordinarily be accomplished by picketing around the employer's premises. Such picketing is usually the most direct and a sufficient means of publicizing the union's grievance to customers and suppliers and their employees, who can then, if they choose, respect the picket line and support the union's cause. Ordinarily, therefore, if the union extends its pickets to other premises, there is a reasonable basis for the inference that the union has attempted more elaborate methods of interference with neutral employers and has sought to embroil them in a dispute not their own. But just as the facts of a particular case may be such that even picketing solely around the primary employer's premises does not conclusively demonstrate that the union has stayed within bounds, so there may be cases where picketing elsewhere does not justify the inference that the union has gone too far.

In this case, it is undisputed that the railroad's operations for Carrier were in furtherance of Carrier's normal business. It is equally clear from the record that the picketing employees made no attempt to interfere with any of the railroad's operations for plants other than Carrier. The railroad employees were not encouraged to, nor did they, refuse to serve the other plants. The picketing was designed to accomplish no more than picketing outside one of Carrier's own delivery entrances might have accomplished. Because the fence surrounding the railroad's right of way was a continuation of the fence surrounding the Carrier plant, there was no other place where the union could have brought home to the railroad workers servicing Carrier its dispute with Carrier. This fact serves to distinguish the present case from those where a union, able to picket at company entrances, would commit an unfair labor practice if it were to picket the home bases of delivery services.

Carrier argues that it is inappropriate in this case to work a balance of interests between the union's right to engage in primary picketing and the neutral employer's right to be free of interference, because the picketing of the railroad gate was attended by threats and coercion of railroad personnel. Such conduct, it is urged, is prohibited in any event. But this misconceives the point at which the balance of interests becomes relevant. The proviso which protects primary activities relates to the prohibited objectives of clause (B). This makes plain that the distinction between primary and secondary picketing is based, as it was in cases arising under the statute prior to the 1959 amendment, on a consideration of the union's objectives. If further demonstration were needed, the legislative history of the 1959 amendments clearly indicates congressional approval of the earlier cases. See H. R. Rep. No. 741, 86th Cong., 1st Sess. 21 (1959); H. R. Rep. No. 1147, 86th Cong., 1st Sess. 38 (1959); 105 Cong. Rec. 16588-89 (Aug. 20, 1959) (analysis of Sen. Kennedy and Rep. Thompson).

It is this distinction, not a distinction between peaceful and violent means, which adjusts the conflicting interests of the union and neutral employers for purposes of § 8(b)(4). If the union's objectives are within the ambit of primary picketing, there is no violation of § 8(b)(4) whatever the means employed. Some other provision of the act may, of course, be violated, as was the case here.⁴

Finally, it is urged that to uphold the union's activity in this case would thwart congressional intent in the 1959 amendments to extend the protection against secondary boycotts to railroads and their employees. Such protection was intended to be given. See 105 Cong. Rec. 16589 (Aug. 20, 1959) (analysis of Sen. Kennedy and Rep. Thompson); 105 Cong. Rec. 18022 (Sept. 3, 1959) (analysis of conference agreement by Rep. Griffin). But nothing in the statute or its history indicates an intent to give railroads greater protection in this regard than other employers because of their status as common carriers or for any other reason. The Board's order legitimates only that picketing directed at railroad operations which service the normal business of

⁴ In another portion of the case, the Board found that the Union had violated § 8(b)(1)(A) of the N.L.R.A., 29 U. S. C. § 158(b)(1)(A), "by the use of threats and physical force against employees of the Carrier Corporation, by obstructing, blocking and preventing the ingress and egress of Carrier employees at entrances to the Carrier plant, by obstructing the ingress and egress of New York Central Railroad Company personnel in the presence of Carrier employees, and by assaulting peace officers in the presence of Carrier employees." The Board issued an appropriate order and an uncontested decree of enforcement had been entered.

Pending the Board's determination, the Regional Director of the N.L.R.B. obtained temporary injunctive relief against picketing of the railroad's premises. *Ramsey v. Local 5895, United Steelworkers of America*, 40 (CCH) Labor Cases 70, 275 (N. D. N. Y., April 16, 1960). The union was also subject to an injunction issued in state court proceedings which, inter alia, limited the places and extent of picketing and enjoined violent or disorderly conduct. *Carrier Corp. v. Brewster*, order entered in the Supreme Court of Onondaga County, April 12, 1960.

the primary employer; it does not legitimate all picketing of a railroad right of way located adjacent or near to the premises of a primary employer.

I would deny Carrier's petition to modify the Board's order.

ORDER

A petition for review of an order of the National Labor Relations Board.

This cause came on to be heard on a petition for review, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the petition for review be and it hereby is granted in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

APPENDIX B

 UNITED STATES COURT OF APPEALS
 FOR THE SECOND CIRCUIT

No. 198—September Term, 1961

PETITIONS FOR REHEARING AND REHEARING IN BANC
 (Submitted November 1, 1962 Decided December 12, 1962)

Docket No. 27079

CARRIER CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

STUART ROTHMAN, General Counsel (Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Norton J. Come, Assistant General Counsel, Melvin J. Welles and Hans J. Lehmann, on the brief), *for respondent, National Labor Relations Board.*

DAVID E. FELLER (Jerry D. Anker and Feller, Bredhoff & Anker, Washington, D. C., on the brief), *for intervenors, United Steelworkers of America, AFL-CIO, and its Local Union 5895.*

ON PETITIONS FOR REHEARING

Before:

LUMBARD, *Chief Judge,*
 SWAN and WATERMAN, *Circuit Judges*

PER CURIAM:

The respective petitions for rehearing are severally denied. Judge Swan has filed a memorandum, appended hereto. Chief Judge Lumbard adheres to his dissenting opinion heretofore filed.

Without objection the opinion of Judge Waterman heretofore filed on October 18, 1962, is amended as follows:

1. A new footnote, numbered 6, is inserted on page [42], after the language "(Footnotes omitted)" which footnote reads as follows:

* Although our purpose in quoting from the Board's opinion in the *McJunkin* case is to demonstrate the approach the Board had toward situations like the one before us, both the Board and the intervenor Union have called our attention to the subsequent judicial history of the case as demonstrating that our quotation of the Board's clearly expressed rationale of discussion is of no present moment.

The Union petitioned the Court of Appeals for the District of Columbia to review the Board's order. The Board cross-petitioned seeking full enforcement. *Teamsters Local Union No. 175 v. NLRB*, 294 F. 2d 261 (1961). The court unanimously held that the Union, in aid of a strike against a distributor of industrial products, *McJunkin*, clearly violated § 8(b)(4)(A) as amended, when, at the premises of a neutral employer trucking concern, it induced the employees of that trucking company not to unload a *McJunkin* truck for transshipment. Nevertheless, a divided court, Chief Judge Miller dissenting, also held it was not unlawful for the Union to pursue the same objective by picketing at a separate entrance to the struck employer's plant. The court's opinion is a one paragraph per curiam and the opinion may have more importance than is presently evident, but it would appear that the results that the District of Columbia court reached (even though relying upon a distinction that appears to be without a difference) are consistent with the results we reach here, for they held, as we do, that it is an unlawful objective for a Union to induce employees of a secondary employer to engage in a secondary boycott when the inducement so to do is conducted, as here, on the secondary employer's premises.

2. Present footnote 6 on page [42] is renumbered footnote 7.

3. After the word "provisions" at the end of subparagraph D on page [43], a new footnote, to be numbered footnote 8, is inserted, reading as follows:

* We view the decision and order of the Board in the case before us as a departure from these principles. Another Board departure may be found in *Local 861, THEW* (Plauche Electric, Inc.), 135 N.L.R.B. No. 41, 49 LRRM 1446 (Jan. 12, 1962). There, although the struck employer had a place of business where his employees reported at the beginning and end of each day and where those employees could have been reached by traditional primary picketing, union members picketed a common job site elsewhere owned by a neutral employer. Despite this, the Board, two members dissenting, held the union activities at the common job site lawful under 8(b)(4). The opinion written for the three member majority stated that the majority was "overruling *Washington Coca Cola* to the extent it is inconsistent," but the opinion offers no hint of a theory to justify its result, save a distaste for "rigid rules" and a new understanding of a supposed congressional intent. The opinion indicates that picketing strikers are still forbidden to have, as even one of their objectives, the objective of affecting the conduct of employees of secondary employers and if results adverse to neutral employers occasioned by the picketing do occur, they can only be justified if they are "incidental results." We find nothing in the opinion to demonstrate that the union had any legitimate reason for extending its picketing activities beyond the primary employer's regular place of business in the locality. All the fact patterns are the same as those in *Washington Coca Cola*. Only the Board's expertise in labor-management affairs appears to have taken a new direction with the advent of a new decade.

4. On page [48], after the paragraph ending with the words "case at bar" the following is inserted:

Nor do we find the decision of this court in *NLRB v. Local 294*, I. B. T. 284 2d 887 (2 Cir. 1960), to be inconsistent with the result herein. In that case which, like *General Electric*, was expressly decided under the law prior to the 1959 amendments to the Act, members of the respondent Union picketed trucks of the struck employer while pickups and deliveries were being made at neutral employers' premises. Although it was evident that the union activities were directed to *secondary* rather than primary em-

employees, we ruled that under the Act prior to the 1959 amendments this fact would not be determinative of illegality unless the neutral employees were encouraged to engage in "a strike or concerted refusal * * * to handle goods of or for the primary employer," 284 F. 2d at 889 (citing *NLRB v. International Rice Milling Co.*, *supra*). From requests which the strikers had made to the neutral employees not to handle the goods of the struck employer, we found the requisite inducement to concerted activity and granted enforcement of the Board order. Since the enactment of the 1959 amendments, however, as we have set forth more fully above, the inducement to *concerted* activity by neutral employees is no longer required for the prescriptions of § 8(b)(4)(A) to come into operation. The amended Act has been broadened by its terms to proscribe any inducement to any neutral employee not to handle the goods of the struck employer.

SWAN, *Circuit Judge*:

The intervenors' petition for rehearing asserts that because I concurred in the result of Judge Waterman's opinion "there is no opinion of the Court to guide the Board, the parties in this case, or the unions or employers who will inevitably find themselves in similar situations in the future." I concurred in the result not because I disagree with anything stated therein (I do not) but because Judge Waterman's opinion failed to include certain additional grounds for affirmance which I thought relevant.

ON PETITIONS FOR REHEARING IN BANC

Before:

LUMBARD, *Chief Judge*,

CLARK, WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN,
HAYS and MARSHALL, *Circuit Judges*.

PER CURIAM:

All of the active judges concurring, except Judge Clark, Judge Smith and Judge Hays who vote to grant, the petition for rehearing in banc is denied.

Judge Clark dissents in separate opinion.

CLARK, Circuit Judge (dissenting from the order denying rehearing in banc):

On any of the principles governing the selections of cases to be heard in *banc* either suggested intermurally or of which I can conceive, the present case would seem a *fortiori* one for such consideration. There can be no question of the importance of the issue; and the present departure from previous holdings of this court and of the Supreme Court, even if not as clear as I believe it to be, certainly presents a *prima facie* case of conflicting precedents. Further, the decision, which rejects the expertise of the National Labor Relations Board, is made by only one of the active judges, with the concurrence of a senior judge and against the powerful dissent of the Chief Judge. An additional anomaly is that the vote on the present order, together with this dissent, shows at least four active judges discontented with the decision; since only one active judge is recorded in favor of it, it seems highly probable that it represents the views at most of only a minority of the court. Because our *in banc* proceedings have actually settled so little, have emphasized division rather than allayed it, I could view with equanimity a decision, if legal, to return to our old course of hearing no cases in *banc*; but our present discriminatory approach, with its correlative consequence, as in a case such as this, of misstating the real position of the court and misleading litigants and others properly interested, seems to me wholly undesirable.

Here we are dealing with the sensitive area in labor relations of the secondary boycott, and particularly with the

proviso for "primary picketing" expressly permitted by § 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U. S. C. § 158(b)(4)(ii)(B). It seems clear and essentially conceded that the union acts in issue would be within the proviso except that they occurred on the railroad right of way, and not on Carrier's premises. But this emphasis on bare legal title has no connection with the purpose or effect of the proviso, and appears to be the statement of a distinction without a difference. Moreover, it is expressly disclaimed in *United Steelworkers of America, AFL-CIO v. NLRB*, 2 Cir., 289 F. 2d 591, 594, and in *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO v. NLRB*, 366 U. S. 667, 678-681, citing the *Steelworkers* case with approval. Thus the situation calls strongly for review by the entire court.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 925

**UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND
LOCAL UNION 5895, UNITED STEELWORKERS OF
AMERICA, AFL-CIO, PETITIONERS**

v.

**NATIONAL LABOR RELATIONS BOARD
AND
CARRIER CORPORATION**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The question presented is whether Section 8(b)(4) (B) of the National Labor Relations Act, as amended, prohibits a union which is engaged in a lawful strike at an industrial plant from picketing at the gate through which a railroad-owned spur track enters and runs adjacent to the plant, for the purpose of inducing persons employed by the railroad not to make normal pickups and deliveries at the struck plant.

(1)

The Board found that such picketing was legitimate primary activity under the principles enunciated in *Local 761, International Union of Electrical Workers v. Labor Board*, 366 U.S. 667, and dismissed the complaint insofar as it alleged a violation of Section 8(b)(4)(B): 132 NLRB 127. The court of appeals (in an opinion by Judge Waterman, with Judge Swan concurring in the result and Chief Judge Lumbard dissenting) set aside the Board's dismissal of the complaint, holding that the picketing was illegal secondary activity. The Board and the Union filed petitions for rehearing *in banc*, which were denied by a vote of a majority of the active judges on the Circuit (Judges Clark, Hays and Smith dissenting). 311 F. 2d 135. The Union, which intervened in the court of appeals, then filed a petition for certiorari.

We believe that the decision of the court of appeals is not only erroneous but incompatible with the principles announced by this Court in *Local 761, supra*. The question of law presented by petitioner is squarely and adequately presented on this record. The importance of the question transcends the particular case, because many industrial plants are served by similar railroad spurs. The Board did not file a petition for certiorari only because the Solicitor General concluded that other cases were entitled to priority in selecting the limited number of cases which the government can properly ask this Court to review.

If the Union's petition for certiorari is granted,
we will defend the Board's order on the merits and
seek reversal of the decision below.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
National Labor Relations Board.

APRIL 1963.

APR 11 1963

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United StatesOCTOBER TERM, 1962³No. ~~998~~ 89

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
AND LOCAL UNION 5895, UNITED STEELWORKERS
OF AMERICA, AFL-CIO,

*Petitioners,**vs.*

NATIONAL LABOR RELATIONS BOARD
AND
CARRIER CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT.

**BRIEF IN OPPOSITION FOR THE CARRIER
CORPORATION.**

DAVID W. JASPER,
Carrier Parkway,
Syracuse 1, New York,

THEOPHIL C. KAMMHOLZ,
KENNETH C. MCGUINNESS,
FRANCIS F. SULLEY,
105 South La Salle Street,
Chicago-3, Illinois,
Attorneys for Carrier Corporation.

April 11, 1963.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962.

No. 925.

**UNITED STEELWORKERS OF AMERICA, AFL-CIO,
AND LOCAL UNION 5895, UNITED STEELWORKERS
OF AMERICA, AFL-CIO,**

Petitioners,

vs.

**NATIONAL LABOR RELATIONS BOARD
AND
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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT.**

**BRIEF IN OPPOSITION FOR THE CARRIER
CORPORATION.**

OPINION BELOW.

The petition's references (Pet., pp. 1-2) to the opinion below are accurate.

JURISDICTION.

The petition's statement (Pet., p. 2) relative to the jurisdiction of this Court is accurate.

QUESTION PRESENTED.

Whether Section 8(b)(4)(B)(i) of the Labor Management Relations Act prohibits a union, engaged in primary picketing at an industrial plant, from inducing employees of a railroad—by picketing the railroad's property which adjoins or is nearby that of the industrial plant—to engage in a strike with the object of forcing the railroad to cease transporting products of the industrial plant.

STATUTES INVOLVED.

The petition's citation and quotation (Pet., pp. 2-4) of the statutes involved is accurate except that the Act referred to therein is more properly cited as the "Labor Management Relations Act, 1947", 61 Stat. 136, as amended, 29 USC 141(a) and the text of Section 8(b)(4)(B), as amended, thereof appears at 73 Stat. 542-543, 29 USC 158 (b)(4)(B).¹

Also pertinent to the question presented is the so-called "publicity proviso" to Section 8(b)(4)(B), which proviso was added by Section 704 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 543. The proviso is quoted at page 14 herein.

1. The petition's quotation (Pet., p. 3) of the (ii) provisions of said Section 8(b)(4)(B) is surplusage in that said petition's statement of the question presented (Pet. p. 2) pertains solely to "inducing" secondary employees; which inducing is proscribed by the (i) provision of 8(b)(4)(B); and does not encompass the violations of Section 8(b)(4)(ii)(B), based upon the union's blocking of access to the railroad's property and its threats to railroad employees at the railroad properties, found by the Court of Appeals for the Second Circuit (Appendix A to Pet., pp. 26-49).

STATEMENT OF THE CASE

A. The Facts.

On and after March 2, 1960, in support of an economic strike against Carrier Corporation (hereinafter called "Carrier"), the petitioning unions picketed each of the eight plant entrances at Carrier's Thompson Road plant in Syracuse, New York. The picketing was accompanied by threats and violence on the part of the unions (J. A. 316; 362-363; G. C. Exh. 9; J. A. 51, 311).

The plant fronts on the east side of a north-south highway known as Thompson Road. Behind Carrier's facilities is a plant of the General Electric Company. South of and adjacent to the two plants are east-west railroad tracks of the New York Central Railroad on a right of way owned by the railroad. Immediately south of and adjacent to the railroad right of way are two other industrial plants, both fronting on Thompson Road.

The railroad tracks described above serve all four of the above-described plants by a series of spurs and are enclosed by a chain-link fence, which also encloses the Carrier property. In the fence is a railroad gate, also fronting on the east side of Thompson Road, through which trains enter upon and leave the sidings and spurs lying on the railroad property. The railroad gate is on the railroad's right of way and when not being used by the railroad the gate is kept locked, with a key in the possession of railroad personnel. Carrier employees are not permitted access to Carrier property through the railroad gate and right of way (G. C. Exh. 9; J. A. 51, 311; J. A. 319, 363).²

2. The petition's statement of the facts is misleading in that it makes it appear that this railroad gate was but a plant gate of Carrier, the primary employer. Thus, the petition states (Pet., p. 4), that the union "picketed the various entrances to the plant premises. One of the entrances picketed . . . is that which is used by the New York Central Railroad in making pickups and deliveries at Carrier."

Although the railroad employees involved herein were not represented by the unions, petitioners herein, the railroad gate described above was picketed on or about the commencement of the strike (J. A. 81, 82, 316, 319), and was the scene of several incidents, the most serious of which took place March 11, 1960. On that date a train, manned by nonsupervisory railroad employees, was stopped at the gate by the pickets and was not permitted to enter until the trainmaster assured the pickets that the Carrier plant would not be served. After switching cars for the other plants, the train—manned this time by railroad supervisors—again attempted to enter upon railroad property through the railroad gate. Thirty to sixty massed pickets—both on the east and west sides of Thompson Road—sought forcibly to restrain the train's movements. Pickets who were lying on the tracks in front of the train had to be removed physically by police officers. A staff representative of the union drove his automobile onto the track during the switching operation and it, too, had to be removed by police officers before the train could continue. An attempt—attributed to the unions by the Trial Examiner—also was made to damage the train by greasing the track and setting the switch in such a manner as to derail the train. Also, the railroad supervisor in charge of the train was challenged by a union picket to get down off the engine "for the purpose of getting my block knocked off" (J. A. 82, 86-94, 136, 316, 319-323; G. C. Ex. 6, 7, J. A. 52, 309, 310).

B. The Decision of the Board.

Upon the foregoing facts, the Trial Examiner concluded that the unions had violated both Section 8(b)(4)(i) and (ii)(B) and 8(b)(1)(A) of the Act (J. A. 325, 327, 335-337, 340). The Board, in agreement with the Trial Examiner

found violations of Section 8(b)(1)(A) of the Act (J. A. 362, 363).

The Board majority, however, reversed the Trial Examiner with respect to the violations of Section 8(b)(4) and dismissed the portions of the complaint relating thereto on the ground that *Local 761, Int'l Union of Elec. Workers (General Electric Co.) v. N. L. R. B.*, 366 U. S. 667 (1961) was dispositive (J. A. 363-364, 368). The Board majority opinion likened the railroad's gate to a separate gate of a single employer and held that, because the services performed by the railroad were services rendered in connection with the normal operations of Carrier, the Act was not violated (J. A. 365-366). Member Rodgers dissented, arguing that the majority decision was in direct contravention of the 1959 amendments to the Act; that reliance on *Local 761 (General Electric)* was misplaced because property of a secondary employer rather than the "reserved gate" of a primary employer was involved; and that the picketing was peaceful in *Local 761*, rather than accompanied by threats and violence as was true in the instant case (J. A. 369-371).

C. The Decision of the Court of Appeals.

The Court of Appeals for the Second Circuit reversed the decision of the Board as it related to Section 8(b)(4) (i) and (ii)(B), Chief Judge Lumbard dissenting.

After a detailed analysis of the development of secondary boycott law (App. A to the Pet., pp. 26-42), the court summarized the pattern of pertinent decisions as one that firmly identified the objects of legitimate primary activity as reaching and publicizing and communicating to primary employees; and that the emergent doctrine required that picketing be conducted in such a manner and at such a place as to minimize the impact on neutral employees insofar as

this could be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees (App. A to the Pet., pp. 42-43). The court added (App. A to the Pet., p. 43):

" The relevance of these principles to the issue before us is clear. In picketing the railroad right of way adjacent to the Carrier plant, the union was not furthering its legitimate objective of publicizing its dispute to Carrier employees. Eight gates on the employer's premises existed, and were picketed, for this purpose. Carrier employees were not permitted access to the plant through the gate on the railroad right of way. In picketing on the railroad right of way the union demonstrated that its manifest, and *sole*, objective was to induce or to encourage railroad employees, or to coerce the railroad, to refuse to handle Carrier goods or otherwise to deal with the primary employer. Such results, although permissible when merely incidental to the pursuit of legitimate objectives, *DiGiorgio Fruit Corp. v. N.L.R.B.*, 191 F. 2d 642 (D. C. Cir., 1951), here involved no such redemptive feature. The actions of the union were thus in violation of §§ 8(b)(4)(i) and (ii)(B) of the Act.

The Court of Appeals went on to note (App. A to the Pet., pp. 46-47) that this Court in *Local 761, Int'l. Union of Elec. Workers (General Electric Co.) v. N.L.R.B.*, 366 U. S. 667 (1961), found picketing at a reserved gate on and to an employer's primary premises to be violative of section 8(b)(4)(B) where such gate was exclusively used by employees of neutral employers; but that such finding of illegality was limited to circumstances in which the neutral employees were not engaged in work connected with the normal operations of the plant. The court added (App. A to the Pet., pp. 47-48):

In so limiting its holding the Court acknowledged the special solicitude of Congress and the Board that the statute not unduly restrict traditional picketing at the premises of the primary employer. *Local 761*

(*General Electric*), *supra*, at 679, 681. (Emphasis by the court)

In this case, however, the union activity occurred on the right of way of the New York Central Railroad. No special policy of greater latitude for picketing at the primary employer's premises thus comes into play, and no distinction based on the work performed by the neutral employees need be made.

We do not find in *General Electric* a policy of the Supreme Court to exempt from the Act's proscriptions all union attempts to keep deliveries from being made to a struck plant, wherever and however such attempts are made. Yet it is this position for which the Board now earnestly contends. Were we to accept such a doctrine, however, we should not be able to distinguish attempts to prevent deliveries from attempts directly to interfere with other business relations between the struck employer and his suppliers or customers. Congress might have written § 8(b)(4) to apply only to union interference with business relations between a struck employer's suppliers and customers and *their* suppliers and customers. It did not do so, nor have the courts failed to find violations of the Act where union activities directly interfered with relations between a struck employer and secondary parties dealing with him. See, e.g., *Local 1976, United Brotherhood of Carpenters (Sand Door & Plywood Co.) v. N.L.R.B.*, 357 U. S. 93 (1958).

We do not read *Local 761 (General Electric Co.) v. N.L.R.B.*, *supra*, to conflict with our disposition of the case at bar.

The dissent (App. A to the Pet., pp. 48-60) would—on the facts of this case—disregard both the locus of the picketing and the ownership of the property picketed and find the picketing not to be violative of section 8(b)(4)(B) since the picketing “was designed to accomplish no more than picketing outside one of Carrier's own delivery entrances might have accomplished” (App. A to the Pet., p. 58).

ARGUMENT.

1. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, BELOW, IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Petitioners contend (Pet., p. 10) the decision of the court below to be in direct conflict with the decision of this Court in *Local 761, International Union of Electrical Workers v. N.L.R.B.*, 366 U. S. 667.

The contention is erroneous and proceeds from a misconception of both the facts and issues in *Local 761*. *Local 761* involved picketing at a "reserved gate" at and to the premises of a primary employer. It was not concerned with picketing—as was done here—at the premises of a neutral employer. Moreover, the issue in *Local 761*—as stated by Mr. Justice Frankfurter, speaking for the court—was whether the Board may apply those standards for controlling picketing at sites *used in common by more than one employer* evolved in *Sailor's Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950), "so as to make unlawful picketing at a gate utilized exclusively by employees of independent contractors who work on the struck employer's premises" (366 U. S. 667, 680). The *Moore Dry Dock* standards, as acknowledged by this Court in *Local 761* (366 U. S. 667, 679), were designed to limit the effects of such common situs picketing to employees of the struck employer.

The decision of this Court in *Local 761* resolved the issue thus posed by holding, in effect, that the *Moore Dry Dock* limitations on picketing would not be applied to picketing of reserved gates on primary premises where such gate

was used by employees of neutral employers who performed work related to the normal operations of the primary employer. In other words, this Court, in *Local 761*, wrote an exception to *Moore Dry Dock* where the picketed premises were those of the primary employer and where the work performed by the neutral employees was related to the normal operations of the primary employer.

Contrary to petitioners' assertion (Pet., p. 11), however, this Court in *Local 761* did not extend such exception to all *Moore Dry Dock* cases, i.e., to common situs picketing at a secondary employer's premises. To do so would obliterate the *Moore Dry Dock* principles since certainly the work of neutral employees at the secondary premises would almost always—assuming any sort of a continuing business relationship between the primary and secondary employer—have a relation to the normal operations of the primary employer.

To further extend *Local 761*'s exception to *Moore Dry Dock* to this case would be an even greater *non sequitur* to the rationale of *Local 761*. Here the picketing was directed purely at secondary employees and at a purely secondary site. It was not a common site. It was not used by primary employees. Under such circumstances, and as held by the court below (App. A to the Pet., p. 47), *Local 761*'s special policy of greater latitude for picketing at the primary employer's premises does not come into play, and no distinction based on the work performed by the neutral employees need be made.

Finally, it is submitted that when one looks to the language of section 8(b)(4)(B) petitioners' conduct is a classic violation thereof. And as the court below observed (App. A to the Pet., p. 46), "After all, the language found in a statute is not wholly irrelevant to its proper construction."

2. THE DECISION OF THE U. S. COURT OF APPEALS FOR THE SECOND CIRCUIT IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

Petitioners' contention (Pet., p. 14) that the holding of the court below is in conflict with decisions of Courts of Appeal for the Eighth and District of Columbia Circuits again fails to distinguish between picketing at secondary premises, picketing at common premises and picketing at primary premises.

Petitioners cite *Seafarers International Union (Salt Dome Production Co.) v. N.L.R.B.*, 265 F. 2d 585 (D. C. Cir., 1959), in illustration. Both the court below and the court in *Salt Dome* agree that in *common situs* cases the objective of the picketing determines its legality. The court in *Salt Dome*, however, would not infer an illegal object unless the picketing had a greater impact on the neutral employer than would picketing at the primary premises. But the facts in *Salt Dome* are peculiar and totally unlike the instant ones. Here the picketing was at a purely secondary premises. In *Salt Dome* the union was picketing the primary employer's vessel which was berthed at a secondary premises and from which vessel the primary employer had removed its employees. In sum, the court in *Salt Dome* found the vessel to be the primary situs of the dispute and found the picketing not violative of section 8(b)(4)(B). Had there been a contrary holding in *Salt Dome*, the union would have been deprived of the right to do any primary picketing. This is not the case here, and the court in *Salt Dome* took care that its holding should not extend beyond the peculiar facts there presented by stating, "We do not intend here to make a ruling broader than the case before us" (265 F. 2d 585, 590). Accordingly, the most that can be said for petitioners'

contention on this point is that perhaps the court below would disagree with the District of Columbia Circuit on the facts in *Salt Dome*. It cannot be said that the District of Columbia Circuit would disagree with the court below on the instant facts.

Other purported conflicts with the court below are even less persuasive. In *DiGiorgio Fruit Corp. v. N.L.R.B.*, 191 F. 2d 642 (D.C. Cir., 1951), cert. denied, 342 U. S. 869, cited by petitioners (Pet. p. 14), a union took disciplinary proceedings within the union against drivers who crossed its lawful primary picket line. The court, viewing the disciplinary proceedings as "... directed solely toward maintaining the observance of its primary picket line ..." found such activity primary in nature.

Petitioners contend the proceedings against the drivers in *DiGiorgio* were not a necessary part of the union's appeal to primary employees and thus contrary to the holding in the instant case (Pet., pp. 15, 16). While it would be more accurate to state the issue in terms of the "incidental" involvement of neutral employees rather than the "necessary part" of an appeal to primary employees, the question remains one of fact as to whether the particular activity is incidental to the pursuit of legitimate objectives. Although one might reasonably disagree with the District of Columbia Circuit's resolution of the facts in the *DiGiorgio* case, it apparently felt that activity which strengthened the desire to honor the existence of a primary picket line, on the part of those who came in contact with that line, was a proper incident of that picketing. However, observance of a primary picket line is not at issue in the instant case. Here, it is the union's secondary picketing at the premises of a secondary employer which the court below found unlawful; picketing designed to augment—not induce observance of—its primary picketing.

In another case, alleged by petitioners to be in conflict with the decision of the court below (Pet., pp. 17-18), the District of Columbia Circuit permitted the picketing union to tell "... employees of neutral trucking concerns, over the telephone, that the plant was picketed, expressly or impliedly asking them to respect the picket line" *Chauffeurs Local Union No. 175 v. N.L.R.B. (McJunkin Corp.)*, 294 F. 2d 261 (D.C. Cir., 1961). The court in *McJunkin* construed such telephone calls to be a normal incident of peaceful primary picketing and found no violation. Again, it may be seriously questioned whether the finding is correct, inasmuch as, if carried to its logical conclusion, it would permit inducement of neutral employees at any location, so long as the appeal was to honor the primary picket line. However, be that as it may, in *McJunkin*, as in the *DiGiorgio* case, the District of Columbia Circuit was concerned with the observance of a lawful primary picket line at the primary employer's place of business. Here, on the other hand, the picket line in question is at the secondary employer's premises. As the court below said, with reference to the *McJunkin* case, in its amended decision:

The Court's opinion is a one paragraph per curiam and the opinion may have more importance than is presently evident, but it would appear that the results that the District of Columbia Court reached (even though relying upon a distinction that appears to be without a difference) are consistent with the results we reach here, for they held, as we do, that it is an unlawful objective for a Union to induce employees of a secondary employer to engage in a secondary boycott when the inducement so to do is conducted, as here, on the secondary employer's premises. (App. B to the Pet., p. 62.)

The final court of appeals case claimed by petitioners to be in conflict with the court below is the Eighth Circuit

decision in *Local 618 v. N.L.R.B. (Site Oil Co.)*, 249 F. 2d 332 (8th Cir., 1957). There, in a case admitted by petitioners (Pet. p. 18) to be distinguishable from the instant facts on the ground that the union's appeals to neutral employees were made on the primary employer's premises, the court refused to find Section 8(b)(4) violated when the union continued to picket a filling station being remodeled, even though the employees of the primary employer left the site and only employees of independent contractors remained. The Eighth Circuit specifically emphasized that the strike was at the business situs of the primary employer, treating the case as a common situs problem throughout. Also, the Eighth Circuit relied heavily on *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665, where this Court found no illegality in inducement aimed at *individual*, as distinguished from *concerted* activity. This concept, as noted by the court below (App. A to the Pet., pp. 36-37) was eliminated in the 1959 amendments by striking the word "concerted" from the opening subparagraph of the section.

Not one of the cases cited by petitioners as in conflict with the decision of the court below involves picketing at the separate premises of a separate employer. To demonstrate a conflict with these cases, each of which interpreted Section 8(b)(4) prior to the 1959 amendments, petitioners must show that activity at a primary picket line is the equivalent of picketing at a secondary employer's premises. Petitioners must also show that appeals to honor a primary picket line, whether through telephone calls or union disciplinary proceedings, are the equivalent of a picket line at a neutral employer's premises. It is respectfully submitted that the statute itself effectively precludes either such showing, particularly since the 1959 amendments to the Act.

Those amendments, which were of considerably greater scope than would appear from petitioners' reference to them (Pet., p. 11), implemented the frequently expressed Congressional intent to eliminate all secondary boycotts and, both through language changes and legislative history, clarified the distinction between primary and secondary activity. Thus, for example, the so-called "publicity proviso" was added to Section 8(b)(4), reading as follows:

Provided further, That for the purpose of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution (29 U.S.C. 158(b)(4), as amended, 73 Stat. 543).

It is submitted that the addition of said proviso would be superfluous if the separate situs of the picket line is not controlling or if inducement of neutral employees away from the primary picket line is proper. Surely, Congress would not have found it necessary to except such publicity from the Section 8(b)(4) prohibitions if appeals to neutral employees away from the site not to cross the primary picket line were permissible. And even the narrow exception in the publicity proviso is not extended to picketing of any type away from the primary employer's premises.

From the foregoing, Carrier respectfully submits the cases cited as in conflict with the court below are readily distinguishable and are, in fact, not inconsistent in result.

3. THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DOES NOT PRESENT A QUESTION OF FEDERAL LAW TO WHICH THIS COURT NEED ADDRESS ITS ATTENTION.

Petitioners contend (Pet., p. 20) that the decision of the court below raises a question of whether an adjoining or nearby railroad siding can be picketed and that "The question cries for an answer and only this Court can answer it." Relating the question to the facts of this case, the question becomes whether the proscriptions of Section 8(b)(4) extend to the inducement of railroad employees by a picket line at premises purely secondary but adjacent or nearby to primary premises.

The question was answered in the affirmative by Congress in its 1959 amendments to the Labor Management Relations Act when it formally extended the protection of Section 8(b)(4) to railroad employees. *N.L.R.B. Legislative History of Labor Management Reporting and Disclosure Act of 1959*, pp. 1079, 1522-1523, 1581, 1706-1707, 1712, 1857.

Previous to the 1959 amendments the question was answered in the affirmative by such cases as *International Rice Milling Co. v. N.L.R.B.*, 183 F. 2d 21 (5 Cir. 1950); *Great Northern Railway Co. v. N.L.R.B.*, 272 F. 2d 741 (9 Cir. 1959); *W. T. Smith Lumber Co. v. N.L.R.B.*, 246 F. 2d 129 (5 Cir. 1957).

And finally, the question was decided in the affirmative by the court below in a manner completely in accord with the evolution of secondary boycott law over the years.

3. No review sought on this point, 341, U. S. 665, n. 2 (1951).

In view of the foregoing, Carrier submits that the law of secondary boycotts, insofar as it concerns this case, is now settled and that petitioners' dissatisfaction is more with the substance of the law than with its clarity.

Conclusion.

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID W. JASPER,
Carrier Parkway,
Syracuse 1, New York,

THEOPHIL C. KAMMHOLZ,
KENNETH C. MCGUINNESS,
FRANCIS F. SULLEY,
105 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Carrier Corporation.

Dated: April 11, 1963.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND
LOCAL UNION 5895, UNITED STEELWORKERS OF
AMERICA, AFL-CIO,

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD
AND
CARRIER CORPORATION

BRIEF FOR PETITIONERS

DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER
MICHAEL H. GOTTESMAN
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorneys for Petitioners

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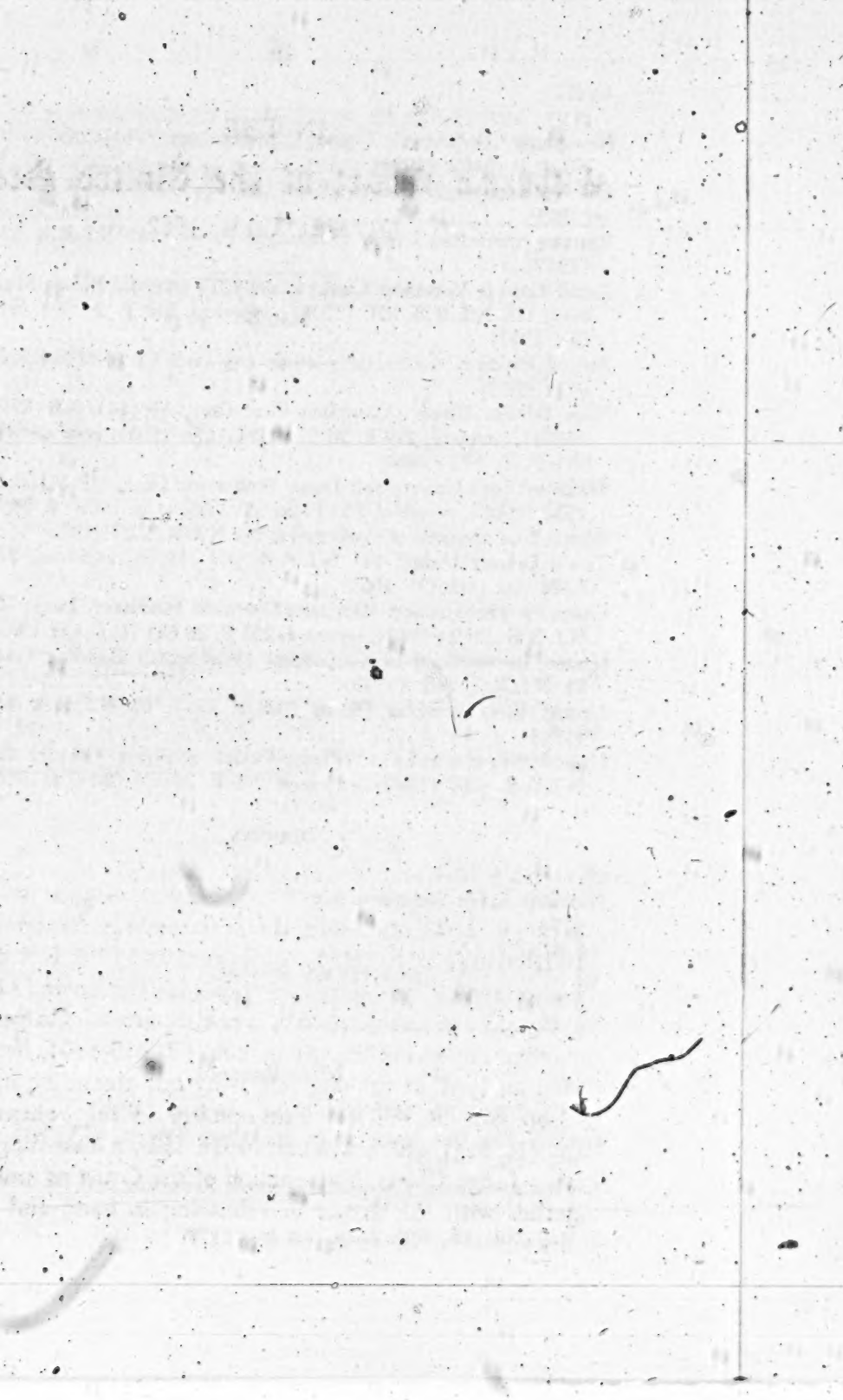
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No. 89

**UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND
LOCAL UNION 5895, UNITED STEELWORKERS OF
AMERICA, AFL-CIO,**

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

AND

CARRIER CORPORATION

BRIEF FOR PETITIONERS

OPINIONS BELOW

The Decision and Order of the National Labor Relations Board (R. 362), including the Intermediate Report of the Trial Examiner (R. 312), is reported at 132 N.L.R.B. 127. The opinion of the Court of Appeals for the Second Circuit, as originally issued (R. 385), is not reported. On petitions for rehearing and rehearing in banc (R. 419-430), the court issued an opinion denying rehearing but amending its original opinion (R. 438), and an opinion denying rehearing in banc (R. 441) which was accompanied by a dissenting opinion by Judge Clark. The opinion of the Court as amended, together with the denial of rehearing in banc and Judge Clark's dissent, are reported at 311 F. 2d 135.

JURISDICTION

The judgment of the Court of Appeals was entered on October 18, 1962 (R. 419). Timely petitions for rehearing and rehearing in banc were denied on December 12, 1962 (R. 443). The petition for certiorari was filed on March 12, 1963, and granted on May 13, 1963 (R. 444). This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Section 8(b)(4)(B) of the National Labor Relations Act prohibits a union which is engaged in a lawful strike at an industrial plant from picketing at the gate at which a railroad-owned spur track enters the plant, for the purpose of inducing persons employed by the railroad not to make pickups and deliveries at the struck plant.

STATUTES INVOLVED

Section 7 of the National Labor Relations Act, 49 Stat. 452 (1935), as amended 29 U.S.C. § 157 (1958), states as follows:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(b)(4)(B) of the Act, as amended, 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(B) (Supp. IV, 1963), states in pertinent part as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . .”

Prior to the 1959 amendments to the Act, the substance of what is now Section 8(b)(4)(B) appeared in Section 8(b)(4)(A), as follows:

“(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or man-

ufacturer, or to cease doing business with any other person;"

Section 13 of the Act, 49 Stat. 457 (1935), as amended 29 U.S.C. 163 (1958), states as follows:

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

STATEMENT OF THE CASE

In this case a divided Court of Appeals, reversing a decision of the National Labor Relations Board, has held that a union committed a "secondary boycott" in violation of Section 8(b)(4)(B) of the National Labor Relations Act when it attempted to induce employees of a railroad not to pick up or deliver goods at a plant where the union was engaged in a legitimate economic strike.

A. The Facts

The essential facts are undisputed. The United Steelworkers of America was, at the time this case arose, the collective bargaining representative of the employees of the Carrier Corporation at its Syracuse, New York plant. In March, 1960, after a period of fruitless negotiations for a collective bargaining agreement, the union called a strike. In connection with that strike, it picketed the various entrances to the plant premises. One of the entrances picketed by the union is that which is used by the New York Central Railroad in making pickups and deliveries at Carrier. It is the lawfulness of the picketing at that entrance which is in issue in this case:

The New York Central serves Carrier by means of a spur which runs along the southern border of the Carrier premises (R. 317). The spur passes through a gate in a chain-link fence which runs along the western border of the Car-

rier premises and continues along the southern side of the spur, thus putting both the spur and the Carrier plant within the same enclosure (R. 319). At one time Carrier had owned all the property inside the plant fence, but it had conveyed the strip on which the spur runs to the railroad prior to the events of this case (R. 318).

The same spur also serves other industrial plants adjacent to Carrier's (R. 317). Just inside the gate, there is a so-called "runaround track," which branches off of the spur, and which is used by the train to reach various pick-up and delivery points located on Carrier property (R. 320, Gen. Counsel Ex. 9, R. 311). In order to switch onto this run-around track, the train must pass back and forth several times through the gate (R. 320).

For the first nine days of the strike, the railroad made no effort to service Carrier, and the union made no effort to interfere with the railroad's use of the gate and the spur to serve its other customers (R. 319). On the tenth day, however, after serving its other customers without incident, the train emerged from the gate and began to make preparations to switch onto the runaround track for the purpose of picking up loaded freight cars on the Carrier property and replace them with "empties." At this point, the union, by picketing and other conduct at the gate, attempted to prevent the railroad from completing this operation (R. 320-23).

B. The Decision of the Board

In so far as the union's conduct at the railroad gate and elsewhere went beyond peaceful picketing and involved force and threats of force, the Board found it to be violative of Section 8(b)(1)(A) of the Act. The union consented to the enforcement of the Board's order remedying those violations, and they are no longer part of the case.

As to the alleged violation of Section 8(b)(4)(B), the Board held that this case was controlled by *Local 761, IUE v. NLRB*, 366 U. S. 667 (1961), the *General Electric* case,

in which this Court had held that a striking union may picket a gate to the struck premises which is used exclusively by employees of other employers, if those employees perform work at the struck site which relates to the normal operations of the primary employer. The Board relied on this Court's specific statement that "if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations" (R. 364).

The Board regarded as immaterial the fact that the railroad tracks, and the gate through which they passed, happened to be owned by the New York Central and not by Carrier. It pointed out that "the gate was an entrance directly into the Carrier premises which the railroad had to use in order to carry out its function of transporting Carrier products to and from the Carrier plant" (R. 365 n.1). It concluded that the "key" to the problem is to be found in the type of work being done by those passing through the gate," and found that "the services performed by New York Central for Carrier—the delivery of empty box cars to Carrier and the transportation of Carrier products—clearly were related to Carrier's normal operations" (R. 365-66). It therefore held that the union had not violated Section 8(b)(4)(B).

Member Rodgers dissented (R. 369-71). He argued that since the railroad tracks were owned by the railroad, not by Carrier, the case was distinguishable from *General Electric*. He also argued that the fact that the union's picketing was accompanied by violence made it not only a violation of Section 8(b)(1)(A), but 8(b)(4)(B) as well.

C. Decision of the Court of Appeals

On review, the Court of Appeals for the Second Circuit reversed the decision of the Board, Chief Judge Lumbard dissenting. The majority opinion, after reviewing a num-

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ber of decisions under Section 8(b)(4), concluded that the only legitimate objective of picketing is to appeal to primary employees, and that "involvement of *neutral* employees" (Emphasis in original) is permissible only "if incidental to the pursuit of a legitimate primary objective." Thus, the Court stated, picketing must be conducted "in such a manner and at at such a place as to minimize its impact on neutral employees insofar as this could be done without substantial impairment of the effectiveness of the picketing in reaching primary employees" (R. 403).

The court then applied these principles to the facts of this case:

"The relevance of these principles to the issue before us is clear. In picketing the railroad right of way adjacent to the Carrier plant, the union was not furthering its legitimate objective of publicizing its dispute to Carrier employees. Eight gates on the employer's premises existed, and were picketed, for this purpose. Carrier employees were not permitted access to the plant through the gate on the railroad right of way. In picketing on the railroad right of way the union demonstrated that its manifest, and *sole*, objective was to induce or to encourage railroad employees, or to coerce the railroad, to refuse to handle Carrier goods or otherwise to deal with the primary employer. Such results, although permissible when merely incidental to the pursuit of legitimate objectives, *DiGiorgio Fruit Corp. v. NLRB*, 191 F. 2d 642 (D.C. Cir. 1951), here involved no such redemptive feature. The actions of the union were thus in violation of §§ 8(b)(4)(i) and (ii)(B) of the Act" (R. 403-404) (Emphasis by the Court).

The court then turned to a discussion of the decisions of other circuits. After citing a number of decisions which it considered "consistent with the principles set forth above,"

it discussed in detail the decision of the District of Columbia Circuit in *Seafarers International Union v. NLRB*, 265 F. 2d 585. (1959), which "denied enforcement of an order of the Board which was clearly required by these principles" (R. 404). It concluded that the decision of the court in that case was erroneous, and stated that "insofar as the decision . . . rests upon a line of reasoning we cannot accept, we find the case unpersuasive" (R. 406).

Finally, the court dealt with the argument that the Board's decision is supported by this Court's decision in the *General Electric* case:

"The Court's holding in *General Electric* does not, of course, conflict with the result we here reach. In both cases, union picketing activities are held to violate § 8(b)(4) of the Act because of their appeal to neutral employees. In *General Electric*, the picketing took place at the premises of the employer with whom the union was engaged in a dispute. The Supreme Court limited its finding of illegality, therefore, to circumstances in which the neutral employees were not engaged in work connected with the normal operations of the plant. In so limiting its holding the Court acknowledged the special solicitude of Congress and the Board that the statute not unduly restrict traditional picketing at the premises of the primary employer . . .

"In this case, however, the union activity occurred on the right of way of the New York Central Railroad. No special policy of greater latitude for picketing at the primary employer's premises thus comes into play, and no distinction based on the work performed by the neutral employees need be made" (R. 407; Emphasis in original).

Chief Judge Lumbard dissented. The crux of his opinion is contained in the following paragraph:

"As I understand the cases in this area, the lawful-

ness of picketing depends on the legitimacy of the union's objective; the place where the picketing occurs is controlling only insofar as it sheds light on the union's objective. The legitimate objectives of picketing include publicizing a dispute to employees of neutral employers who are performing part of the everyday operations of the struck employer. Since the picketing which occurred here had that objective, and since there was no other place where the union could conduct such picketing, I agree with the National Labor Relations Board that there was no violation of the Act" (R. 408).

The dissent pointed out that the majority's premise—"that the only lawful objective of picketing is to reach the employees of the primary employer"—is squarely in conflict with *General Electric* (R. 415-16). And it rejected as irrelevant the majority's preoccupation with ownership of the railroad right-of-way:

"Nowhere in the opinion in *Local 761* can I find the 'special solicitude' for picketing the premises of a primary employer which the majority finds, except insofar as the location of the picketing indicates its motive What the [majority's] alleged distinction comes down to is that the union can seek to influence neutral employees at the premises of the primary employer and not elsewhere (which in this case means, of course, that it cannot use pickets to influence the railroad workers at all). But this makes the test not the union's objective but the location of the picketing, a test which the majority itself admits to be obsolete" (R. 416).

Both the Board and the Union petitioned for rehearing and for rehearing in banc (R. 419, 430). On December 12, 1962, the petitions were denied, Judges Clark, Smith and Hays dissenting on the denial of rehearing in banc (R. 441). It was announced that Chief Judge Lumbard, though he

did not vote for rehearing, "adheres to his dissenting opinion heretofore filed" (R. 438). Judge Waterman amended his opinion to respond to the contention in the petitions that certain of the cases upon which he relied in his opinion had been expressly overruled or reversed (R. 438-441). Judge Clark filed an opinion explaining his dissent, in which he stated that "There can be no question of the importance of the issue; and the present departure from previous holdings of this court and of the Supreme Court, even if not as clear as I believe it to be, certainly presents a *prima facie* case of conflicting precedents" (R. 441-442).

SUMMARY OF ARGUMENT

I

A. Section 8(b)(4)(B) does not prohibit a union which is engaged in a lawful economic strike from inducing employees of other employers, by picketing or other means, not to make pickups and deliveries at the struck employer's plant. The central thesis of the decision below, that the only legitimate object of picketing is to appeal to the employees of the "primary" employer and that the statute prohibits all appeals to other employees which are not merely an unavoidable incident of an appeal to primary employees, was squarely rejected by this Court's recent decision in the *General Electric* case, *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U. S. 667 (1961).

In *General Electric*, the union picketed a gate to the struck employer's premises which had been reserved exclusively for employees of other employers who performed various types of work on the struck premises. Although such picketing plainly appealed solely to the secondary employees, this Court, reversing a decision that the picketing was unlawful *per se*, held that the picketing would be lawful if the work performed by the secondary employees was delivery work, maintenance work, or other work related to the struck employer's normal operations.

The court below attempted to distinguish *General Electric* on the basis of a fact totally unrelated to the rationale either of its own opinion or of the *General Electric* opinion—the location of the picketing. Before discussing this distinction in detail, however, we believe it is necessary to put the *General Electric* decision in its historical context.

B. The Board and the courts have always recognized that Section 8(b)(4), despite its broad language, was designed to prohibit secondary boycotts and not to affect the lawfulness of the ordinary primary strike. In the years 1947 to 1952, the Board held that attempts to induce all persons, including employees of other employers, to stop working at a struck employer's premises were traditional primary conduct not prohibited by the statute. On the other hand, the Board held that any attempt to induce a work stoppage by secondary employees elsewhere than at the primary employer's premises is an unlawful secondary boycott.

The *Moore Dry Dock* rules, first announced in *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547 (1950), were designed to implement this principle in the context of the so-called "common situs" situation, where the primary employer's business is located on premises owned by, or shared with, another employer. In that case, the Board held that a union could picket the secondary employer's dry dock, where the primary employer's struck ship was being serviced, so long as the picketing is conducted (1) only when the struck ship was at the dock, (2) when the struck employer is engaged in his normal business at the dock, (3) in a manner clearly disclosing the identity of the offending employer, (4) as close as possible to the situs of the dispute. The Board in that decision made clear that the purpose of these rules was not to prevent the picketing from affecting secondary employees, but only to prevent it from inducing them to refuse to perform work elsewhere than on the struck ship.

After 1953, the Board gradually began to change its view.

It took the position that the only legitimate object of picketing is to appeal to the employees of the primary employer, and any appeals to secondary employees were prohibited unless they were unavoidable incidents of appeals to primary employees.

This new notion first appeared in a series of common-situs cases, in which the primary employer also had his own separate premises at which picketing could be conducted. The Board, on the basis of its new doctrine, held in those cases that if the union could adequately appeal to primary employees by picketing the separate premises, then all picketing at the common premises would be unlawful, even if it complied with the *Moore Dry Dock* safeguards.

Eventually, this new doctrine was applied to cases involving no common situs, but picketing of the ordinary industrial plant. In a number of cases of which *General Electric* itself is typical, the Board found picketing at such a plant to be unlawful where it was addressed solely to employees of other employers, and could not be justified as "incidental" to an appeal to primary employees.

This Court, in its decision in *General Electric*, necessarily overruled this doctrine. It also rejected the opposing contention, based on the earlier Board cases, that the legitimacy of appeals to secondary employees depended upon whether they were being asked to refrain from working only at the struck employer's premises or elsewhere.

Instead, this Court held that "the key to the problem" was "the type of work that is being performed" by the secondary employees. If the secondary employees are performing work related to the normal operations of the primary employer, then the striking union may lawfully induce them to stop performing that work. Conversely, if their work is unrelated to the primary employer's operations, then any direct interference with that work must be regarded as "secondary" pressure.

In essence, this Court held that any effort to bring direct

economic pressure on the primary employer by causing a stoppage of work related to his normal operations is primary, irrespective of the identity of the employees who are engaged in the stoppage or the location of the work. On the other hand, any effort to induce secondary employees to stop performing work unrelated to the primary employer's operations is "secondary," since the object of such conduct is to bring indirect pressure on the primary employer through the application of direct pressure on the secondary employer.

It is thus plain that the cases holding that all direct appeals to secondary employees are unlawful cannot survive the decision in *General Electric*, and that the decision of the court below, to the extent that it relies on that discredited doctrine, cannot stand.

C. It is equally plain that the present case cannot be distinguished from *General Electric*—as the court tried to distinguish it—on the basis of the location of the picketing. Indeed, neither *General Electric* nor any case which preceded it has made the location of picketing, in itself, the test of its lawfulness.

In the early Board cases, the question was not where the union was picketing, but where the work was which the pickets were asking the secondary employees not to perform. If the work was at the primary employer's premises, the picketing was lawful. Otherwise, it was not.

In the cases decided between 1953 and 1961, the question was not where the union was picketing, but to whom the picket signs were addressed. Even picketing at the primary premises was held unlawful where it appealed solely to secondary employees.

In *General Electric*, this Court said the question was not where the union was picketing, but what type of work it was asking the secondary employees not to perform.

Of course, the location of picketing activity in many cases is evidence of its object. But in this case, there is no dispute that the object of the picketing was to induce the railroad

employees not to make pickups or deliveries at the Carrier premises. Since this Court in *General Electric* expressly acknowledged that pickups and deliveries are related to the normal operations of a plant, the object of the picketing was plainly lawful, and its location totally irrelevant.

II

The argument above disposes of the grounds upon which the court below based its decision. The company, however, and the dissenting member of the Board, have also argued that even if the peaceful aspects of the picketing did not violate Section 8(b)(4)(i)(B), the physically coercive aspects violated Section 8(b)(4)(ii)(B).

Section 8(b)(4)(ii) does not prohibit physical coercion as such any more than Section 8(b)(4)(i) prohibits peaceful picketing as such. The statute prohibits either form of activity only when it is engaged in for one of the objects which it specifically prohibits.

Thus, if the "object" of the union's conduct were unlawful, then even peaceful picketing for that object would be unlawful. But since, as we have seen, that object was "lawful," Section 8(b)(4) does not prohibit even violent conduct which has the same object.

This is not to say that the violence was lawful. It obviously violated state law, and was found by the Board to violate Section 8(b)(1)(A) of the Act as well. But since its object was not one prohibited by Section 8(b)(4), it could not violate that Section.

ARGUMENT

I—SECTION 8(b)(4)(B) DOES NOT PROHIBIT A UNION WHICH IS ENGAGED IN A LAWFUL STRIKE FROM ENGAGING IN PICKETING OR OTHER CONDUCT FOR THE PURPOSE OF INDUCING EMPLOYEES OF OTHER EMPLOYERS TO REFRAIN FROM MAKING PICKUPS AND DELIVERIES AT THE PREMISES OF THE STRUCK EMPLOYER.

The sole question in this case is whether the union violated the secondary boycott provision—Section 8(b)(4)(B)—of the National Labor Relations Act by engaging in picketing and other conduct for the purpose of inducing persons employed by the New York Central Railroad not to make pickups and deliveries at the plant of Carrier Corporation, against which the union was then engaged in a lawful economic strike. The court below, reversing the Board, answered that question in the affirmative.

To the extent that the union's conduct went beyond peaceful persuasion, and involved elements of physical coercion and restraint, the Board held that the union violated Section 8(b)(1)(A) of the Act. The union has not challenged that aspect of this case, and it is not in issue in this Court.

Similarly, Carrier Corporation has never contended that the union interfered in any way with any of the railroad's other operations. There was no strike or concerted pressure against the New York Central generally. As the company stated in its brief in the court below, "this conduct of the Unions directed toward the railroad and its employees was limited to occasions when the railroad sought to service Carrier."

The central thesis upon which the entire opinion of the court below rests is that under Section 8(b)(4)(B) the only legitimate objective of any strike or picketing activity is to induce the employees of the employer with whom the

union has a legitimate dispute to refrain from working, and that "involvement of the employees of *neutral* employers [is] permissible only if merely incidental to the pursuit of a legitimate primary objective." Accordingly, the court said, picketing, to be lawful, must "be conducted in such a manner and at such a place as to minimize its impact on neutral employees insofar as this could be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees." (R. 403. Emphasis by the court).

Once having established that premise, the conclusion that the union's conduct in this case was unlawful followed automatically. The union's dispute was with Carrier Corporation. The picketing in issue here was plainly conducted in such a manner, and at such a place, as to appeal solely to the employees of the New York Central not to make deliveries or pickups at the Carrier plant. The appeal plainly was not "incidental" to any appeal to Carrier employees and hence, on the premise of the court below, was plainly unlawful. The premise is, however, simply erroneous.

The question of whether, and to what extent, Section 8(b)(4) prohibits a union which is on strike against an employer from seeking the assistance of employees of other employers has been the subject of considerable litigation since 1947, when that Section was first added to the statute.¹

¹ The statute, of course, was amended in 1959, and this case arises under the amended version. The amendments, however, affect this case only in the following respects:

1. They make it clear that railroads and their employees are to be treated the same as other employers and employees under Section 8(b)(4), although they are not otherwise covered by the Act. See 2 Legislative History, Labor Management Reporting and Disclosure Act of 1959 at 1522-23, 1706-07, 1712, 1857.

2. They make explicit what was previously only implied—that the language of Section 8(b)(4)(B), which is carried over essentially unchanged from the old 8(b)(4)(A), is not to be "construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

3. They provide for the first time that other forms of coercion

Unfortunately, this great volume of litigation seems at times to have served more to confuse than to clarify the issue. At various times in its history, the NLRB, and to a lesser extent even the courts, have taken various positions on this question, many of them sharply in conflict with one another.

Thus the court below was able to cite some decisions which seemed to support the result which it reached, just as it was able to cite some which seemed in conflict with that result.

If this were a case of first impression in this Court, therefore, it would be appropriate to begin this brief by examining the various cases, pro and contra, in the light of the statute and the legislative history, to determine which view is most in accord with the purposes of the Act.

But this is not a case of first impression. The same issue, which is presented in this case was presented to this Court in the *General Electric* case, *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U. S. 667 (1961), and the decision in that case is dispositive of this one.

Thus, unlike the court below, we believe that any discussion of the issue in this case must begin with a discussion of the decision in the *General Electric* case.

A. The General Electric Decision Plainly Holds That a Striking Union May Lawfully Induce Employees of Other Employers Not to Perform Work Which Is Related to the Normal Operations of an Employer with Whom the Union Has a Legitimate Dispute.

In *General Electric*, the union, in the course of a lawful strike against a plant of General Electric Company, picketed

and restraint, in addition to strikes and picketing, are unlawful if engaged in for one of the objects specified in the statute. The question of whether this change affects this case is discussed at pp. 39-42, *infra*.

On the basic question in this case, whether the union's picketing was "primary" or "secondary," the cases decided under the prior statute are equally relevant under the amended statute.

For the convenience of the Court, we have reproduced both the original statute and the amended version at pp. 3-4 of this brief.

all of the gates to that plant, including a gate which had been reserved by the Company for the exclusive use of independent contractors and their employees, who performed work at the struck premises. In addition to the picketing, the union orally requested contractors' employees, as they approached the gate, not to enter.

The sole question in the case was the validity of the picketing at this reserved gate, and the accompanying oral appeals. The Board held that the union's conduct was unlawful because its "object" was "to enmesh these employees of the neutral employers in its dispute with the Company." 123 N.L.R.B. 1547, 1550-51. The Court of Appeals affirmed the Board's decision. 278 F. 2d 282 (D.C. Cir. 1960).

Despite the somewhat allegorical language of the Board's opinion in *General Electric*, it is quite apparent that what made the union's conduct in that case unlawful in the Board's view was the fact that the picketing and the oral appeals were addressed *solely* to the employees of other employers, and therefore could not be justified as "incidental" to an appeal to employees of General Electric to stay away from the struck premises. This was the theory urged before the Board by its General Counsel, 123 N.L.R.B. at 1561-62,³ and urged in this Court, in support of the Board's decision, by General Electric. See Br. for Resp. Gen. Elec. Co. at pp. 1415.

Thus, the theory of the decision of the Board in *General Electric* was precisely the theory on which the Court below relied in this case: picketing, to be lawful, must "be conducted in such a manner and at such a place as to minimize its impact on neutral employees insofar as this [can] be done without substantial impairment of the effectiveness of

³ In this Court, the Board presented an argument which one commentator has described as "at the least, a significant reformulation of the Board's approach to Section 8(b)(4); at most, it was an outright abandonment." Leinick, *The Gravamen of the Secondary Boycott*, 62 Colum. L. Rev. 1363, 1385 (1962). Since the Board's argument was not accepted by this Court, it is unnecessary to discuss it here.

the picketing in reaching the primary employees" (R. 403). Had this Court accepted that principle, it would have had to affirm the decision of the Board in *General Electric*.

But this Court did *not* accept that principle, and it did *not* affirm the Board's decision in *General Electric*. The question, the Court said, was one of distinguishing between "legitimate 'primary activity' and banned 'secondary activity.'" The question was not to whom the picketing was addressed. "Picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer," 366 U. S. at 673-74.

What, then, is the line? After reviewing the decisions the Court concluded that "the key to the problem is found in the type of work that is being performed by those who use the separate gate." Where the secondary employees "were performing tasks unconnected to the normal operations of the struck employer—usually construction work on new buildings"—appeals to them were appeals for secondary pressure. "On the other hand," the Court said, "if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion of traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations" 366 U. S. at 680-81 (emphasis supplied).

Thus, the Court in *General Electric* held that picketing for the sole purpose of inducing the employees of "neutral" employers not to work is *lawful* if their work aids the everyday operations of the struck employer. Asking secondary employees to refrain from making deliveries, or performing other work related to the struck employer's operations, is "traditional primary activity." On the basis of this reasoning, the Court vacated the decision of the Board and the Court of Appeals, and remanded the case for a deter-

mination of the type of work performed by the employees using the reserved gate. On remand the Board found that the work was such as to make the picketing lawful, and thus reversed its previous decision. 138 N.L.R.B. No. 38, 51 L.R.R.M. 1028 (1962).

The conclusion which this Court reached in *General Electric* is plainly contrary to the central thesis of the court below—that only appeals to primary employees are lawful in themselves, and that the involvement of neutral employees is permissible only if “incidental to the independently legitimate objective of publicizing the dispute with the primary employer to the employees of *that* employer” (R. 406, emphasis added). This conflict was not acknowledged, however. Instead, the court below developed its entire thesis on the basis of cases decided before *General Electric* and, at the very end, brushed that decision aside on the basis of a fact totally unrelated to the rationale of the decision—the fact that the picketing there took place at the primary employer’s premises. It did this despite its later statement, on rehearing, that a distinction based on location was “a distinction that appears to be without a difference” (R. 439).

We will deal with this distinction in Part C, beginning at p. 34, below. Before doing so, however, we believe it is necessary to describe in some detail the relationship between the *General Electric* decision and the development of the law which preceded it. It was apparently the failure of the court below to understand this relationship which led it to rely on cases which, as we shall see, *General Electric* necessarily overruled, and to attempt to distinguish *General Electric* on a ground which is extraneous both to that decision and to the statute itself.

B. To the Extent That the Decisions Upon Which the Court Below Relied Support Its Conclusion, They Are in Conflict with *General Electric*.

As we have indicated above, prior to this Court’s decision in the *General Electric* case the decisions of the Board and

the lower federal courts were in a state of considerable conflict and confusion on the question of whether, and to what extent, a union may lawfully request the assistance of secondary employees in connection with a lawful primary strike.

It was presumably for the purpose of resolving that conflict that this Court originally granted certiorari in *General Electric*. However, this Court's opinion in that case does not expressly acknowledge the existence of this conflict, nor does it name the decisions and articulate the doctrines which its decision necessarily overrules. Therefore, in order to determine which of the many cases decided prior to *General Electric* are still good law, it is necessary not only to examine the opinion in *General Electric*, but also the background of conflicting decisions against which that case arose.³ That background can conveniently be divided, as the court below divided it, into two periods: 1947 to 1952, and 1953 to 1961.

1. *The Period of Consistency: 1947-1952*

In the years immediately following the enactment of Section 8(b)(4)(A) (which is now 8(b)(4)(B))⁴ the Board developed a rather simple and straight-forward interpretation of that Section, based on the premise that the statute was designed to prohibit "secondary boycotts," but was not intended to affect the lawfulness of the ordinary primary strike. Thus, the Board held that it is an unlawful secondary boycott for a union to engage in a strike or picketing against a "secondary" employer, at that employer's premises, in order to bring pressure on the "primary" employer, with whom the union has a legitimate dispute. *E.g., United Brotherhood of Carpenters (Wadsworth Building Co.)*, 81 N.L.R.B. 802.

³ For a more extensive review of the relevant cases than is possible within the limits of this brief, see the section entitled "The Shifting Currents of Board Doctrine, 1949-1962" in Lesnick, *The Gravamen of the Secondary Boycott*, 62 Colum. L. Rev. 1363, 1366-1392 (1962).

⁴ See note 1, *supra*.

(1949); *Printing Specialties Union (Sealbright Pacific)*, 82 N.L.R.B. 271 (1949). This appears to be the type of conduct with which Congress had been most concerned:

"Under clause (A) strikes or boycotts, or attempts to induce or encourage such action, were made unfair labor practices if the purpose was to force an employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. Thus it was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B. Similarly, it would not be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of, or does business with, employer B." H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 43 (1947). See also S. Rep. No. 105, 80th Cong., 1st Sess. 22 (1947).

On the other hand, the Board, in a number of cases, held that it was not an unfair labor practice for a union, in connection with a strike against a primary employer, to "induce or encourage" employees of other employers not to enter or perform work at the primary employer's premises. E.g., *Oil Workers Int'l Union (Pure Oil Co.)*, 84 N.L.R.B. 315 (1949); *United Elec. Workers (Ryan Constr. Co.)*, 85 N.L.R.B. 417 (1949); *Newspaper Deliverers' Union (Interborough News Co.)*, 90 N.L.R.B. 2135 (1950). The Board reasoned that the traditional primary strike had always included efforts by the striking union, through picketing and other means, to persuade all persons, including customers and secondary employees as well as primary employees, not to enter or perform work at the struck site, and the legislative history of the Act did not indicate any Congressional intention to reach this common type of activity. It therefore concluded that Section 8(b)(4)(A) should not be construed to prohibit such conduct.

On the basis of this reasoning the Board held that all picketing around the primary employer's premises was lawful, even where it took place at a gate used exclusively by secondary employees. *Ryan Constr. Co., supra*. On the same reasoning, the Board also held that other types of inducement of secondary employees to stay away from the struck premises were not prohibited by the statute. In *Pure Oil*, for example, the union wrote a letter to the employees of a ship, owned by a secondary employer, asking them not to load products at the struck employer's dock. And in *Interborough News*, the striking union visited secondary employees in their homes to ask them not to make deliveries to the struck employer's newsstands. This type of conduct, the Board held, was no more unlawful than picketing the primary employer's premises, since it also did not ask secondary employees to engage in a strike against their employer, but only to refrain from working at the struck site.

The same result was reached where the nature of the primary employer's business was not stationary. In *International Brotherhood of Teamsters (Schultz Refrigerated Service, Inc.)*, 87 N.L.R.B. 502 (1949), the union was on strike against a trucking company. The union pickets followed each truck, and picketed around it whenever it stopped to make pickups and deliveries at the premises of other employers. Since the picketing was confined to the trucks—which in this case were analogous to the "premises" of a stationary employer—the Board held the picketing lawful, even though it induced employees of other employers not to load or unload the trucks. The Board stressed the fact that the picketing at the premises of secondary employers took place only when the trucks were there, and only in their immediate vicinity.

During this same period the Board developed its now famous *Moore Dry Dock* doctrine, which requires special mention because it appears to have been the source of much of the confusion which subsequently arose. In *Sailors'*

Union of the Pacific (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1950), the Board was confronted with the problem of applying the principle of the above cases to a factual situation in which the union could not picket the primary employer without simultaneously picketing the secondary. The primary employer in that case was the owner of a ship, the S.S. Phopho, which at the time the case arose was being serviced at a dock owned by Moore, a secondary employer. The union pickets were not permitted on the dock, where they could have picketed the ship, so they picketed in front of the Moore premises. The problem posed by this conduct was not that it might induce employees of Moore to refrain from servicing the Phopho—this the union could clearly do under the doctrine of the cases cited above—but that it might induce them to refrain from performing any work at the Moore premises. To avoid this result, the Board held that picketing in such circumstances would be permissible only if it complied with the following safeguards: (1) the picketing must take place only when the situs of the dispute (the ship) is located at the secondary premises, (2) it must take place only when the primary employer is engaged in his normal business at those premises, (3) it must take place reasonably close to the situs of the primary dispute, and (4) the pickets must disclose clearly that the dispute is with the primary employer. These rules were subsequently applied the primary employer's business was located at the premises by the Board in all "common situs" cases—cases in which the primary employer's business was located at the premises of a secondary employer, or premises shared by the primary employer with other employers.

The original purpose of these safeguards was to assure that the effect of the picketing on secondary employees would not be broader than the usual effect of primary picketing. Their purpose was not to prevent the picketing from affecting secondary employees at all. The Board in *Moore Dry Dock* made it absolutely clear that it was not modifying the principle developed in the other cases cited above, but

merely adapting that principle to the peculiar circumstances of a "common-situs" situation.

During this period, this Court dealt directly with the question of the extent to which a striking union may enlist the aid of secondary employees in *International Rice Milling Co. v. NLRB*, 341 U. S. 665 (1951). In that case, union pickets in front of a struck plant induced secondary employees who were operating a truck not to cross the picket line. The Board had found no violation, relying upon its decision in *Pure Oil*, 84 N.L.R.B. 360 (1949). The Fifth Circuit had reversed the Board, holding essentially what the court below held in the present case: that any attempt to induce employees of a secondary employer to refrain from working is a violation of Section 8(b)(4). 183 F.2d 21 (1950).

This Court reversed the court of appeals, and upheld the original decision of the Board. In doing so, however, the Court articulated its decision somewhat differently than the Board had. Instead of distinguishing between "primary" and "secondary" activities, the Court stated:

"A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of § 8(b)(4), and they do not here." 341 U. S. at 671

It was never entirely clear whether this reasoning was intended to imply any limitation on the holding of the Board that Section 8(b)(4) does not prohibit any attempt to induce employees of secondary employers not to work at the struck employer's premises. While the above-quoted excerpt could be read more narrowly than the prior Board decisions, other portions of the opinion seemed to support the Board

fully. Thus, the Court stressed the fact that "Congress did not seek, by § 8(b)(4), to interfere with the ordinary strike." *Id.* at 672. Perhaps even more significantly, the Court cited with apparent approval the Board's decision in *Pure Oil and Ryan*, each of which involved wholesale and undisguised inducements of secondary employees not to work at the primary employer's premises. *Id.* at 672-73 n. 6.

Thus, at least until 1953, this Court's decision in *International Rice Milling* was generally construed as vindicating the position of the Board. Compare the majority opinion in *Di Giorgio Fruit Corp. v. NLRB*, 191 F. 2d 642, 649 (D. C. Cir.), *cert. denied*, 342 U. S. 869 (1951) with the separate opinion of Judge Miller in that case, 191 F. 2d 654.

In 1953, however, a new administration in Washington brought new members to the NLRB, who began to read this Court's decision in *International Rice Milling* more and more narrowly, and Section 8(b)(4)(A) more and more broadly.

2. The Period of Conflict and Confusion: 1953-1961

The first hint that the law was about to become unsettled came in *Brewery Drivers Local 67 (Washington Coca Cola Bottling Co.)*, 107 N.L.R.B. 299 (1953), *enforced*, 220 F. 2d 530 (D.C. Cir. 1955). In that case, the union was on strike against a soft-drink bottling plant. In support of the strike it picketed the plant, and also assigned pickets to follow the struck employer's trucks as they delivered the plant's products to retail stores. The union also picketed the stores at times when the trucks were not present, with signs which purported to be addressed only to consumers, but in a manner calculated to appeal as well to secondary employees working at the stores or making deliveries to them. There was thus sufficient evidence for the Board to find that at least some of the picketing activities at these stores violated Section 8(b)(4)(A) on any theory. The Board, however, held that all picketing away from the main bottling

plant was unlawful. It distinguished *Moore Dry Dock* and *Schultz* on the ground that in those cases there was no place other than the secondary employer's premises where the union could picket. The reason why this distinction was significant was not explained.

From this decision there developed what became known as the *Washington Coca Cola* doctrine. That doctrine was that picketing at a secondary employer's premises, even if it met the four *Moore Dry Dock* safeguards, was unlawful if the employer had his own premises at which the union could picket.⁵ A rationale for this doctrine was ultimately developed, and was stated most fully in *Local 657, International Brotherhood of Teamsters (Southwestern Motor Transport, Inc.)*, 115 N.L.R.B. 981, 983-84 (1956): Picketing at the primary employer's premises is permitted by the Act, the Board said, because it brings pressure on the primary employer "through appeals to his own employees, and any affect which such picketing may have on the employees of some other employer is regarded as only incidental." Picketing at a secondary employer's premises, on the other hand, is prohibited by the Act because it appeals to secondary employees. An exception occurs, however, when there are no primary premises to picket. In that limited situation picketing at the secondary premises at which the primary employer's business is located is permitted on the basis of a "reasonable, although rebuttable, presumption that a labor organization in such circumstances is seeking to appeal only to the primary employer's employees."

Although the Board, in announcing this new formulation of the difference between primary conduct and secondary conduct, dutifully cited *Pure Oil*, *Ryan*, and *Moore Dry*

⁵ See, e.g., *Sales Drivers Union (Campbell Coal Co.)*, 110 N.L.R.B. 2192 (1954) reversed, 229 F. 2d 514 (D.C. Cir. 1955), cert. denied, 351 U.S. 972; *Seattle Dist. Council of Carpenters*, 114 N.L.R.B. 27 (1955); *International Bh'd of Teamsters Local 659*, 116 N.L.R.B. 461 (1956); *Truck Drivers Union*, 111 N.L.R.B. 483 (1955); enforced, 228 F. 2d 791 (5th Cir. 1956).

Dock, among others, it simultaneously scuttled the very principle for which they stood. Henceforth, the validity of picketing would not turn on whether the union was appealing to secondary employees to stop working elsewhere than at the primary employer's premises, but whether it was appealing to them at all. Henceforth, only those effects on secondary employees which could be regarded as "incidental" would be tolerated. In a subsequent case (in which the Board reached what appears to have been a correct result on the facts)²⁴ the new rule was expressed even more bluntly:

"In developing and applying these [common situs] standards, the controlling consideration has been to require that the picketing be so conducted as to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees." *Retail Fruit & Vegetable Clerks Local 1017 (Crystal Palace Market)*, 116 N.L.R.B. 856, 859 (1956), enforced, 249 F. 2d 591 (9th Cir. 1957) (Emphasis by the Board).

It was not long before the Board had a case in which the application of this principle effectively barred all picketing. In *Seafarers' Int'l Union (Salt Dome Production Co.)*, 119 N.L.R.B. 1638 (1958), reversed, 265 F. 2d 585 (D.C. Cir. 1959), the union was on strike against a ship being serviced at a secondary employer's shipyard (essentially the facts of *Moore Dry Dock*). There were, however, no primary employees on the ship. The picketing, therefore, could not possibly be justified as an appeal to primary employees with

²⁴ The strike in that case was against one of several independent fruit stands located in one large fruit market. The owner of the struck stand happened also to be the owner of the market building. The union picketed the entire building, although it was given permission to enter the building for the purpose of picketing only the struck stand. In those circumstances, the union's conduct plainly exceeded the *Moore Dry Dock* limitations.

only "incidental" effects on secondary employees. The Board, therefore, held it to be violative of Section 8(b)(4)(A).

This new notion that the Act requires picketing to be conducted in such a way as to "minimize its impact on neutral employees" was first developed and applied in "common situs" cases such as *Washington Coca Cola*. Its logic, however, was equally applicable to picketing at single-employer premises, and it was not long before the Board began applying it in such situations also. Thus, in *Local 618, Automotive Employees (Incorporated Oil Co.)*, 116 N.L.R.B. 1844 (1956), reversed, 249 F. 2d 332 (8th Cir. 1957), a union, in support of a primary strike against a chain of gasoline service stations, picketed one of the service stations which the employer had temporarily shut down for repairs. Since the only employees working at that station were those employed by independent contractors making the repairs, the Board held that the picketing was intended to appeal only to those employees, and hence violated Section 8(b)(4). The fact that those employees were working at the premises of the primary employer was held to be irrelevant.

The decision of the Board in the *General Electric* case and the other separate gate cases⁸ logically followed. Once having developed the theory that the only legitimate object of primary picketing is to appeal to primary employees, the conclusion that picketing at a gate which was used solely by secondary employees is unlawful followed automatically. The union's object was to "enmesh" the employees of the secondary employers in the primary dispute, hence it violated Section 8(b)(4).

⁸ *United Steelworkers (Phelps-Dodge Refining Corp.)*, 126 N.L.R.B. 1367 (1960), enforced, 289 F. 2d 591 (2d Cir. 1961); *Local 36, International Chemical Workers Union (Virginia-Carolina Chemical Corp.)*, 126 N.L.R.B. 905 (1960), enforced, 47 L.R.R.M. 2493 (D.C. Cir.), cert. denied, 366 U. S. 949 (1961). See also *Union de Trabajadores (Gonzales Chemical Industries, Inc.)*, 128 N.L.R.B. 1352 (1960), reversed, 293 F. 2d 881 (D.C. Cir. 1961).

This Court, in *General Electric* stated that the "Board has since applied its rationale, first stated in the present case, only to situations where the independent workers were performing tasks unconnected to the normal operations of the struck employer—usually construction work on his buildings." 366 U. S. at 680. In fact, however, the Board's rationale in *General Electric* was not first stated in that case, but can be traced back to *Washington Coca Cola*. Moreover, that rationale had nothing to do with the nature of the work done by the secondary employees. It was based solely on the fact that they, were not primary employees. Indeed, in at least two cases which this Court seems to have overlooked, the rationale was applied by the Board in situations where the secondary employees were performing ordinary delivery work plainly related to the normal operations of the struck employer. *Chauffeurs Local 175 (McJunkin Corp.)*, 128 N.L.R.B. 522 (1960), *reversed*, 294 F. 2d 261 (D.C. Cir. 1961) (picketing at separate gate to primary premises used solely for deliveries and pickups); *Lumber Workers Local 2409 (Great Northern Ry.)*, 122 N.L.R.B. 1403 (1959), 126 N.L.R.B. 57 (1960). (picketing at separate entrance used solely by railroad making pickups and deliveries).

At no time, however, did this new principle become firmly established as law. The Board itself did not ever expressly overrule *Pure Oil*, *Interborough News*, or any of the other cases, with the exception of *Ryan*,⁷ in which the original distinction between primary and secondary picketing had been developed. Moreover, the Board decisions in which the new concepts were applied did not fare well in the courts of appeals. The *Washington Coca Cola* doctrine was re-

⁷ *Ryan* was overruled by a minority of the Board in *Retail Fruit Clerks (Crystal Palace Market)*, 116 N.L.R.B. 856, 859 (1956), *enforced*, 249 F. 2d 591 (9th Cir. 1957), and by a majority of the Board in *Virginia-Carolina Chemical Corp.*, note 6 *supra*.

peatedly criticized.⁹ The Eighth Circuit denied enforcement of the Board's order in *Incorporated Oil*,¹⁰ and the decisions in *Salt Dome*¹⁰ and *McJunkin*¹¹ were rejected by the D.C. Circuit.

To add to the confusion, the Board from time to time throughout this period sustained as "primary" activity union conduct which was plainly calculated to appeal principally to secondary employees. In *Chauffeurs Local 200 (Milwaukee Plywood Co.)*, 126 N.L.R.B. 650 (1960), *affirmed*, 285 F. 2d 325 (7th Cir. 1960) the union, in support of a strike at a Chicago plant, picketed the employer's wholly owned subsidiary in Milwaukee. After a short time, the employees of the subsidiary ignored the picket line and continued working, but the pickets did succeed in preventing secondary employees from entering the premises. The inference that this was the principal, if not the sole, purpose of the picketing was bolstered by the fact that the union instructed these secondary employees by telephone not to cross the picket line. Nevertheless, the Board found this to be lawful primary activity. Similar conduct was upheld in *International Brotherhood of Teamsters (Alexander Whse. Co.)*, 128 N.L.R.B. 916 (1960), where the picketing in question took place at the primary employer's non-union warehouses. Obviously, the union did not seriously expect the non-union primary employees to stop working—the sole purpose and effect of the picketing was to persuade unionized secondary employees not to enter the primary employer's warehouses. And in *International Organization of Masters, Mates & Pilots (Chicago Calumet Stevedoring*

⁹ See *NLRB v. Local 294, Int'l Bhd of Teamsters*, 284 F. 2d 887, 891 (2d Cir. 1960); *Sales Drivers v. NLRB*, 229 F. 2d 514 (D.C. Cir. 1955); *cert. denied*, 351 U.S. 972 (1955); *NLRB v. General Drivers*, 223 F. 2d 205 (5th Cir. 1955), *cert. denied*, 350 U.S. 914 (1955).

¹⁰ *Local 618, Automotive Employees v. NLRB*, 249 F. 2d 332 (8th Cir. 1957).

¹¹ *Seafarers Int'l Union v. NLRB*, 265 F. 2d 585 (D.C. Cir. 1959).

¹² *Chauffeurs Local 175 v. NLRB*, 294 F. 2d 261 (D.C. Cir. 1961).

Co.), 125 N.L.R.B. 113 (1959), the union, in connection with a strike against certain shipping companies, not only picketed the struck ships but also appealed directly to secondary employees, by means of telegrams to and conferences with officials of their unions, and speeches at their union meetings, not to load, unload, or otherwise perform work on the struck ships. The Board found no violation of Section 8(b)(4)(A) except in those instances where the union's picketing violated the *Moore Dry Dock* criteria.

It was against this background of confusing and conflicting decisions that *General Electric* was presented to this Court.

3. *This Court's Resolution of the Problem*

The facts of *General Electric* compelled this Court to resolve the conflict which had developed as to where the line between lawful primary conduct and prohibited secondary conduct was to be drawn. If all appeals to secondary employees were to be considered unlawful except insofar as they were "incidental" to a permissible appeal to primary employees, then clearly the union's conduct in that case was unlawful, since it took place at a separate gate where there could only be secondary employees. On the other hand, if all appeals to secondary employees to refrain from performing work at the primary employer's premises were lawful, then clearly the union's conduct in that case was protected primary activity, since it sought solely to keep secondary employees away from the struck plant.

The Court, however, was plainly dissatisfied with either of these contentions. It recognized that to bar appeals to certain secondary employees, such as those who make deliveries to the struck employer, would be an altogether undue restriction on the right to strike. It recognized also, however, that where the primary employer simply shares a common location with other employers whose operations are unrelated to his own, union pressure against those other em-

employers must be regarded as secondary, even though the shared premises might be owned by the primary employer. 366 U. S. at 678-79.

Thus, the Court concluded that "the key to the problem" was the "type of work that is being performed" by the employees appealed to—not, as the Board had held, the identity of the employees to whom the union was appealing nor, as the union contended, the location of the work which the union was asking those employees to stop performing. If the secondary employees are performing work related to the normal operations of the primary employer, then it is a lawful part of a primary strike to induce those employees to refrain from doing that work until the dispute is settled. Conversely, if their work is unrelated to the primary employer's operations, then any direct interference with that work must be regarded as "secondary" pressure.

The theory of the decision seems to be that the primary strike is essentially an effort to bring pressure on the primary employer by interrupting his normal operations. The secondary boycott, on the other hand, is an effort to bring pressure on secondary employers to force them to stop doing business with the primary. Thus, when a union asks employees—whether they be primary or secondary—to refrain from doing work related to the primary employer's operations, it is engaging in primary conduct. The "object" of such conduct is not to bring pressure on the secondary employer, but to interrupt the operations of the primary. On the other hand, when the union asks secondary employees to refrain from performing work which is unrelated to the primary employer's operations, it is engaging in secondary conduct, since its "object" is not to bring direct pressure on the primary, but to bring indirect pressure on him through the application of pressure on the secondary employer.

It is thus clear that the decision of this Court in *General Electric* reversed not only the rationale of the Board's decision in that case, but a number of other cases as well.

Surely, the *Washington Coca Cola* doctrine could not survive.¹² Since the delivery of Coca Cola was as much a part of the employer's operations in that case as the bottling of Coca Cola, the striking union could lawfully picket not only the bottling plant, but the employer's delivery trucks, for the purpose of inducing secondary employees not to unload the trucks, service them, or perform other work related to that part of the primary employer's operations. Nor could the Board's decision in *Salt Dome* survive, since the union in that case was merely asking employees of the secondary employer not to perform maintenance and repair work on the struck ship. Similarly, the decisions of the Board in *McJunkin* and *Great Northern Ry.* were necessarily overruled by this Court's decision in *General Electric*, since in both cases the union was simply asking secondary employees not to make deliveries or pickups at the struck employer's premises.

Thus, the cases relied upon by the Court below simply are no longer the law, at least to the extent that they hold or imply that the statute prohibits appeals to secondary employees who perform work related to the normal operations of the plant.

The only remaining question raised by the opinion of the court below is whether the present case can be distinguished from *Local 761* on the basis of the location of the union's picketing. We turn now to an examination of that question.

C. The Location at Which Picketing Is Conducted Is Relevant Only Insofar as It Tends to Reveal Its Purpose. Since the Purpose of the Picketing in This Case Is Undisputed, Its Location Is Irrelevant.

As we have seen, the principal thesis of the court below was that picketing is unlawful if it is addressed solely to the

¹² It is significant that the Board itself has recently overruled *Washington Coca Cola*. *Local 861, IBEW (Plauche Elec. Inc.)*, 135 N.L.R.B. 250 (1962).

employees of secondary employers. As we have demonstrated, that thesis, although it finds support in some Board decisions prior to the *General Electric* decision of this Court, is in square conflict with that decision, which plainly held that a union may lawfully induce secondary employees, by picketing, or otherwise, to refrain from performing work related to the primary employer's operations.

The court below, however, distinguished *General Electric* in the following fashion:

"The Court's holding in *General Electric* does not, of course, conflict with the result we here reach. In both cases union picketing activities are held to violate § 8(b)(4) of the Act because of their appeal to neutral employees. In *General Electric*, the picketing took place at the premises of the employer with whom the union was engaged in a dispute. The Supreme Court limited its finding of illegality, therefore, to circumstances in which the neutral employees were not engaged in work connected with the normal operations of the plant. In so limiting its holding the Court acknowledged the special solicitude of Congress and the Board that the statute not unduly restrict traditional picketing at the premises of the primary employer. *Local 761 (General Electric)*, *supra* at 679, 681.

In this case, however, the union activity occurred on the right of way of the New York Central Railroad. No special policy of greater latitude for picketing at the primary employer's premises thus comes into play, and no distinction based on the work performed by the neutral employees need be made." (R. 407; emphasis in original).

It is impossible to reconcile this reasoning with the balance of the court's opinion. The court's basic rationale, that the statute requires picketing to be conducted so as to minimize its impact on neutral employees to the extent it is possible

to do so without precluding appeals to primary employees, is equally applicable whether the picketing is conducted at the primary premises or elsewhere.

We are thus constrained to treat the last few paragraphs of the court's opinion as an alternative holding, to this effect: assuming that it is lawful for a striking union to engage in picketing at the primary employer's premises for the purpose of inducing secondary employees to refrain from performing work related to the primary employer's operations, it is nevertheless unlawful to engage in picketing or other conduct for the same purpose at any other location. Since in this case the railroad tracks, and the gate through which they entered the struck plant, were not owned by the primary employer, the picketing in this case was not conducted "at the primary employer's premises" and was therefore unlawful.

The location at which a union engages in picketing is, in most circumstances, a good indication of what such picketing is expected to accomplish. For that reason, the Board and the courts have generally paid considerable attention to the question of where the picketing activities have been conducted. But despite all the changes and fluctuations which have taken place in the law, there has never, to our knowledge, been a case in which the location of the union's picketing has itself been regarded as the controlling consideration.

The statute with which we are here concerned does not, after all, regulate picketing as such. It prohibits a union from inducing or encouraging employees to engage in work stoppages for certain prohibited objectives. Picketing is one of several ways in which unions "induce or encourage" work stoppages. Nor does the statute make any distinction based on where the inducement or encouragement takes place. The question in every case is not where it takes place, but what is its purpose or "object." The location of the picketing or other inducement is important only as it sheds light on the purpose or object sought to be achieved.

As we have seen, in the cases decided between 1947 and 1952 the Board did rely in certain cases on location. The location which was important, however, was the location of the work which the secondary employees were to perform, not the location of the pickets. If that work was located on the premises of the primary employer, the Board held in the 1947-1952 period that inducement of the secondary employees not to perform it was lawful; if the work was located elsewhere, inducement of primary employees not to perform it was lawful but inducement of secondary employees was not. In no case, however, was the form of the inducement or its location regarded as controlling in itself.

Thus, in *Pure Oil*,¹³ the inducement took the form not only of picketing at the primary site, but also a letter to the secondary employees. In *Interborough*¹⁴ the inducement included visits to the secondary employees away from the primary premises. In *DiGiorgio*¹⁵ it took the form of union disciplinary action against secondary employees who disobeyed the union's instructions. All of these inducements occurred away from the primary site. Nevertheless, the Board found no violation since the secondary employees were being induced only to stop working at the primary premises.

Of course, when the inducement took the form of picketing, as it almost always did, the location of the picketing was highly relevant because unions usually picket the place where they are attempting to cause work to be stopped. But the controlling consideration was not the location of the picketing, but the location of the work which the employees were being asked not to perform.

In the cases decided between 1953 and 1961, the Board, in some cases at least, stopped asking "where" and began asking "who," adopting the view that all appeals to secondary employees were unlawful unless they were merely the by-product of lawful appeals to primary employees. Here again, when the inducement took the form of picketing, the location

¹³ 84 N.L.R.B. 315 (1949).

¹⁴ 90 N.L.R.B. 2135 (1950).

¹⁵ 191 F. 2d 642 (D.C. Cir.), cert. denied, 342 U. S. 869 (1951).

of the picketing was relevant in determining whether the union was appealing to primary or to secondary employees, but was not itself the controlling consideration. Thus in *Washington Coca Cola*, picketing of the primary employer's trucks at the premises of secondary employees was regarded as a way of appealing principally to secondary employees, and therefore unlawful, since the union could adequately reach primary employees by picketing the employer's plant without affecting secondary employees. In *General Electric* and the other separate gate cases, the fact that the picketing took place at a gate used solely by secondary employees was regarded by the Board as proof that the purpose of the picketing was solely to appeal to such employees. But the basic test in each case was the purpose of the picketing, not the location.

This Court in *General Electric*, as we have seen, rejected both the "where" and the "who" approaches and said that "the key to the problem" is "the type of work" which the employees were being asked not to perform. (366 U. S. at 680). As we read that decision, this test does not depend on where the work is to be performed at all. If work related to the primary employer's normal operations is being performed at a secondary employer's premises, as for example, in *Moore Dry Dock*, then, under this Court's decision, the union can ask the workers not to perform it, so long as it does so in a manner which does not interfere with work unrelated to the primary employer's operations. Conversely, if secondary employees are performing work at the primary employer's premises which is unrelated to that employer's operations, and a separate gate has been reserved for the exclusive use of such employees, then the union cannot picket at that gate even though the work is located on the primary premises.

Even if we should be wrong in our reading of the *General Electric* decision, and that decision is somehow regarded as setting forth a rule applicable only to the primary employer's premises, the applicability of the rule must depend on where the work is to be performed, not where the solicitation takes

place. The only relevance that the location of the picketing can possibly have is as evidence of the "object" of the solicitation.

In the present case, there has never been any dispute as to the "object" of the union's picketing activities. It was to prevent the employees of the New York Central Railroad from moving its train on track located on Carrier property in order to make pickups and deliveries at the Carrier plant. Since that track was connected to the railroad's main spur inside the plant enclosure, the union could picket only on the public road adjacent to the gate through which that main spur ran. But it did not interfere with the railroad's use of the gate or the spur to serve its other customers. Only when the railroad was attempting to switch onto tracks which ran on Carrier property, for the purpose of picking up Carrier products, did the union take action.

Since the purpose of the union's picketing activity is thus clear and undisputed, the location at which that activity occurred has absolutely no bearing on this case. And since that purpose was solely to prevent the railroad employees from performing work related to the operations of Carrier, the union's conduct did not violate Section 8(b)(4)(B).

II—THE PRESENCE OF COERCION, IN ADDITION TO PEACEFUL PERSUASION, DOES NOT CONVERT CONDUCT WHICH IS OTHERWISE LAWFUL UNDER SECTION 8(b)(4)(B) INTO A SECONDARY BOYCOTT

The argument above disposes of the two grounds upon which the court below relied for its decision that the union's picketing in this case was unlawful—that the picketing was addressed solely to secondary employees, and that it took place around tracks and a gate owned by the secondary employer. There is, however, another argument which the company has advanced for finding that the union's picketing violated Section 8(b)(4)(B). That argument is that

even if the peaceful aspects of the picketing did not violate Section 8(b)(4)(i)(B), the physically coercive aspects violated Section 8(b)(4)(ii)(B). The dissenting opinion of Board Member Rogers relies in part on this argument. (R. 370-71).

We find nothing in the opinion of the court below which indicates that the court accepted that argument, although the company apparently believes that it did. See *Br. in Opp. for Carrier Corp.*, p. 2, n. 1. Since it appears that the company intends to press this argument in this Court, we deal with it here.

The question raised by this argument is not, of course, whether conduct which is physically coercive is or is not lawful. Violence in all its aspects is prohibited by state law, and indeed a state court in this very case issued an injunction against violent conduct connected with the strike. Moreover, Section 8(b)(1)(A) of the Act prohibits coercion or restraint of employees in the exercise of their rights under the Act. The conduct of the union in this case was found to be in violation of that Section, and we have not challenged that finding.

Section 8(b)(4)(ii), however, does not prohibit coercion and restraint as such, any more than 8(b)(4)(i) prohibits strikes and picketing as such. The statute prohibits either form of activity only when it is engaged in for one of the prohibited objects specified by the statute.

This is clear not only from the language of the statute, but from its legislative history. Section 8(b)(4) as originally written prohibited only the most common form of union pressure against secondary employers—strikes and picketing—where the object of such pressure was to force a secondary employer to stop doing business with the primary employer. Those who advocated amendment of the statute in 1959 contended that the statute contained a “loophole” to the extent that it did not reach other forms of pressure which had the same object. Thus, while unions could not strike or

picket the secondary employer, they could threaten to do so with impunity. They could also induce persons employed by secondary employers who are not "employees" as defined in the Act to engage in secondary work stoppages. They could also, at least so far as federal law was concerned, physically coerce or restrain the secondary employer, or his supervisors, to force them to stop doing business with the primary.

It was to eliminate these "loopholes" that Section 8(b)(4) was amended. The new language found in 8(b)(4)(ii) was thus designed to prohibit any form of coercion of secondary employers to force them to stop doing business with a primary employer. ~~is to be prohibited.~~ See 2 Legislative History, Labor-Management Reporting and Disclosure Act of 1959 pp. 977, 979, 989, 993-94, 1079.

Congress did not, however, amend Section 8(b)(4) so as to prohibit coercion and restraint regardless of its object. The structure of the statute remained the same—certain conduct is prohibited only when engaged in for certain prohibited objects. The definition of these prohibited objects was not changed in any manner material to this case.

Thus, the question in the present case is not whether the union's conduct was of the sort covered by Section 8(b)(4), but whether its "object" was one which falls within the prohibition of that Section. Even peaceful picketing is prohibited if its object is unlawful. Therefore, if the union's object in this case were one prohibited by Section 8(b)(4), its action would violate that section even if it had been unaccompanied by violence. Conversely, even physical coercion is not prohibited by Section 8(b)(4) if its "object" is not one of those specified in that Section.

As we have seen, the union's object in this case was to interrupt the primary employer's operations, not to bring pressure on the secondary employer, New York Central. That "object," under this Court's decision in *General Electric*, is

not one of those prohibited by Section 8(b)(4). Accordingly, the union's conduct, whether peaceful or violent, cannot constitute a violation of that Section.

CONCLUSION

For the reasons stated, the decision of the court below should be reversed.

Respectfully submitted,

DAVID E. FELLER

ELLIOT BREDHOFF

JERRY D. ANKER

MICHAEL H. GOTTESMAN

1001 Connecticut Avenue, N. W.

Washington, D. C. 20036

Attorneys for Petitioners

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 89

UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND
LOCAL 5895, UNITED STEELWORKERS OF AMERICA,
AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND CARRIER
CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals, as amended on petitions for rehearing (R. 385-418, 438-441), is reported at 311 F. 2d. The decision and order of the Board (R. 312-373) are reported at 132 NLRB 127.

JURISDICTION

The judgment below was entered on October 18, 1962 (R. 419), and petitions for rehearing were denied on December 12, 1962 (R. 443-444). The petition for a writ of certiorari was filed on March 12, 1963, and

was granted on May 13, 1963 (R. 444).¹ The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Sections 10 (e) and (f) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, are set forth in the Appendix, *infra*, pp. 27-28.

QUESTION PRESENTED

Whether Section 8(b) (4) (B) of the National Labor Relations Act prohibits a union, in the course of a lawful strike at an industrial plant, from picketing the entrance to a railroad-owned spur track immediately adjacent to the struck premises, for the purpose of inducing persons employed by the railroad not to make pickups and deliveries at the struck plant.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On January 15, 1960, the United Steelworkers of America, AFL-CIO was certified by the Board as the representative of production and maintenance employees of Carrier Corporation, at its plant in Syracuse, New York. On March 2, 1960, when the parties were unable to reach agreement on a contract, the Union called a strike in support of its demands (R. 314-316; 42, 55-56). During the strike the Union picketed the several gates leading to the Company's plant—the employee and truck entrances, as well as a

¹ The Board filed a memorandum in response to the petition, in which it indicated that, if the petition were granted, the Board would participate in the proceeding and defend its order.

gate through which the switch tracks of the New York Central lead to the Company plant and the plants of several other employers (R. 316; 58-60, 311). This case concerns the picketing at the railroad gate.

The western boundary of the Carrier plant runs along Thompson Road, a public highway, and is enclosed by a link fence on the east side of the road. A spur track of the New York Central crosses Thompson Road at the southern boundary of the plant, and continues for some distance (in an easterly direction) along that boundary. (R. 363, 317; 78-79, 311.) By means of this spur the railroad furnishes freight service to Carrier, and to several other plants in the vicinity (R. 317; 311).² The right-of-way on which the spur is located, a strip approximately 35 feet wide, was originally owned by Carrier and then conveyed by it to the railroad (R. 318, 365). It is enclosed by a wire fence, which is a direct continuation of the Thompson Road fence surrounding the Carrier property (R. 363; 148-150, 311).³ Access to the railroad right-of-way is by means of a gate which was padlocked when not used for railroad switching services and was not accessible to Carrier employees (R. 319, 363; 44-45, 60, 69, 70, 77-80, 139, 146-148, 305-307). The railroad had to use the gate in order to deliver raw materials and

² After the spur track enters the gate, a number of subsidiary tracks branch off from it and lead into the various plants. There are 12 such subsidiary tracks into the Carrier plant and warehouse facilities (R. 311).

³ The Thompson Road fence continues past the railroad right-of-way, then turns at a right angle from Thompson Road, and continues in an easterly direction (R. 311).

parts to the Carrier plant and the other plants in the vicinity, and to ship out finished goods (R. 365; 62, 311).

During the first days of the strike, the railroad continued to make deliveries to the other plants along the right-of-way inside the fence, without hindrance by the pickets (R. 319; 82-84, 106-107, 110-111, 239-240). But the railroad unions, representing the train service employees, indicated to the railroad that their members did not wish to cross the picket line in order to furnish service to Carrier, and the railroad did not make deliveries to or from Carrier prior to March 11, 1960 (R. 319, 95-98, 112-115). On that day, pursuant to arrangements made with Carrier, the railroad, using supervisory personnel, undertook to pick up 14 loaded cars at the Carrier plant and to deliver a like number of "empties" (R. 319-320; 82-83, 87-88). In carrying out this work, the train made several passages through the railroad gate. The Union pickets obstructed the train movements by congregating on the track and other action. The train was able to pass only after the pickets were dispersed by sheriff's deputies. (R. 320-322; 87-90, 92-93, 123-124, 135-136, 284-285, 292-293.)

B. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Trial Examiner found that the picketing at the railroad gate violated Section 8(b)(4)(i) and (ii)(B) of the Act in that it

sought to induce a work stoppage by railroad personnel, and to restrain the railroad, for an object of forcing it to cease doing business with Carrier (R. 323-325). He further found that the Union had restrained and coerced the Carrier employees, in violation of Section 8(b)(1)(A), by barring ingress and egress at the other gates to the plant, by the use of threats and physical force against such employees, by assaulting police officers in their presence, and by obstructing the ingress and egress of railroad personnel in their presence (R. 325-340).⁴

The Board sustained the Examiner's findings of a Section 8(b)(1)(A) violation and entered an appropriate remedial order (R. 326-363, 367-368).⁵ It concluded, however, (with one Member dissenting) that the picketing at the railroad gate was primary activity and thus not proscribed by Section 8(b)(4)(i) and (ii)(B), and accordingly dismissed the complaint insofar as it alleged a violation of that section (R. 363-366, 368).

With respect to the picketing at the railroad gate, the Board pointed out that it was carried on at the

⁴ Much of this activity occurred at gates other than the railroad gate. However, several Carrier employees witnessed the obstructing tactics which occurred at the railroad gate. Moreover, some of the pickets threatened with physical harm two non-striking employees of Carrier who were sent to the railroad gate to take photos of the train incidents (R. 326-329, 336-337).

⁵ The Union consented to the entry of a decree enforcing this portion of the Board's order, and it is not relevant to the portion of the case now before this Court. See *infra* pp. 24-26.

site of the Carrier plant and merely sought to deter the railroad and its personnel from performing services related to Carrier's normal operations. In these circumstances, the Board held that the picketing was primary under the test enunciated in *Local 761, International Union of Electrical Workers v. National Labor Relations Board*, 366 U.S. 667, notwithstanding that the gate through which the train passed was on a right-of-way owned by the railroad (R. 364-366).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals (in an opinion by Judge Waterman, with Judge Swan concurring in the result and Chief Judge Lumbard dissenting) set aside the Board's dismissal of the complaint. The court concluded that the picketing at the railroad gate was secondary, and thus in violation of Section 8(b)(4) (B), because "the union was not furthering its legitimate objective of publicizing its dispute to Carrier employees. * * * In picketing on the railroad right-of-way the union demonstrated that its manifest, and sole, objective was to induce or encourage railroad employees, or to coerce the railroad, to refuse to handle Carrier goods, or otherwise to deal with the primary employer" (R. 403).. This Court's decision in *Local 761, supra*, was distinguished on the ground that it "dealt with picketing *at the premises of the primary employer*," whereas here "the union activity occurred on the right of way of the New York Central * * *" (R. 407).

Chief Judge Lumbard, dissenting, agreed with the Board that the picketing at the railroad gate was legitimate primary activity under the test enunciated in *Local 761, supra*. He stated (R. 408):

* * * the lawfulness of picketing depends on the legitimacy of the union's objective; the place where the picketing occurs is controlling only insofar as it sheds light on the union's objective. The legitimate objectives of picketing include publicizing a dispute to employees of neutral employers who are performing part of the everyday operations of the struck employer. Since the picketing which occurred here had that objective, and since there was no other place where the union could conduct such picketing, I agree with the National Labor Relations Board that there was no violation of the Act.

Petitions by the Board and the Union for rehearing before the court *in banc* were denied (R. 441-442).

SUMMARY OF ARGUMENT

The Board's findings of fact show that this is a simple—indeed, elementary—case of primary picketing protected by the proviso to Section 8(b)(4)(B). The majority in the court of appeals unfortunately became confused by some of the complex rules applicable to situations where two employers are engaged in independent operations at a common site, but never before applied to picketing aimed at stopping deliveries which are part of the struck employer's normal business at the scene of the labor dispute.

Picketing at an industrial plant involved in a labor dispute has traditionally been carried on by labor unions with the hope of isolating that employer from a variety of normal business relations. It seeks to cut off his labor supply by inducing present employees to cease work and prospective employees not to enter the plant. It attempts to turn away servicemen of all kinds, such as electricians or plumbers doing maintenance work. It may deter customers or salesmen. It is aimed at pickups and deliveries, whether by rail or truck, common or private carrier. To all who would enter the plant, the conventional plea is not to cross the picket line. In its simplest form such primary picketing is addressed indiscriminately to everyone who approaches the struck plant. No one, as we understand the contentions, suggests that such picketing is unlawful even when addressed to a truck driver making deliveries on behalf of a neutral employer. *National Labor Relations Board v. International Rice Milling Co.*, 341 U.S. 665.

The size and complexity of modern industrial plants make it possible to have employees enter at one gate, to make shipments and receive deliveries at a second, and to have salesmen and customers use a third. On this basis the argument has been advanced that picketing at the gate where pickups and deliveries are made violates Section 8(b)(4) because it is not directed at employees of the struck employer. This Court flatly rejected the argument in *Local 761, International Union of Electrical Workers v. National*

Labor Relations Board (General Electric Co.), 366 U.S. 667. Not only did the Court state unequivocally (p. 681)—

if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations. * * *

but it held that the union was privileged to picket a separate gate if used by servicemen engaged in normal maintenance work in the struck plant, as distinguished from independent new construction.

The court below distinguished the *General Electric* case upon the ground that the picketing took place at the gate leading to a 35-foot strip bordering the plant owned by the railroad and on which the tracks were located, rather than at a gate to Carrier's premises (R. 391, 407). The matter of title is immaterial. The picketing took place on a public way, as it usually does. From every practical or functional standpoint, whether in terms of labor relations or practical business operations, it made no difference whether the tracks were on land owned by Carrier or the railroad. The frequent references to picketing at the premises of the primary employer which are found, in one form or words or another, in Board and court opinions, have been used in distinguishing picketing at the place of the labor dispute from picketing at some quite different location such as the site of a secondary employer's

own business. Under the *General Electric* case, the railroad's mere use of the strip adjacent to the Carrier plant to perform tasks which aid Carrier's everyday operations cannot be regarded as an independent business which would warrant protection against the Union's picketing.

Nothing in the Board's ruling interferes with the purpose of Congress to bring secondary pressure against railroad companies under Section 8(b)(4) by changing the words "the employees of any employer" to read "any individual employed by any person engaged in commerce or in an industry affecting commerce." The aim was to treat railroads like other secondary employers, such as servicemen or truck drivers, not to give them a preferred position because sometimes they make deliveries to the plant on tracks which they own rather than on the primary employer's driveway or a public street.

Finally, we point out that the allegations of violence are utterly irrelevant to the application of Section 8(b)(4) although they are important under Section 8(b)(1)(A), which is not involved here.

ARGUMENT

INTRODUCTION

The question presented is whether Section 8(b)(4) (B) of the Act, as amended by the Labor-Management Reporting and Disclosure Act of 1959, forbids a union, in furtherance of a lawful strike at a manufacturing plant, from picketing the entrance to a railroad-owned

spur track immediately adjacent to the struck premises for the purpose of inducing the railroad personnel not to make pickups or deliveries there. Under Section 8(b)(4)(B) it is an unfair labor practice for a labor organization—

(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * * *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing, * * *

This section, like the corresponding provision of the earlier Taft-Hartley Act, is directed only at what is known as the "secondary boycott." *Local 761, International Union of Electrical Workers v. National Labor Relations Board (General Electric Company)*,

366 U.S. 667, 672. The proviso to clause (B), added in 1959, for the first time made explicit what the Board and the courts had deemed implicit in the 1947 statute—that the “primary strike or primary picketing” is not proscribed.* It is clear that the acts complained of in the present case are covered by clauses (i) and (ii). Moreover, since the “object” of the picketing was to bring about a cessation of the railroad’s normal services to the struck plant, the conduct appears to come within the literal terms of clause (B), if that language is construed without reference to the proviso. The crucial question is whether the union’s activity constituted “primary picketing” and is therefore sheltered by the proviso. †

The terms “primary and secondary” had a varying meaning at common law,† and Congress has never undertaken to define them. Instead, it has left to the Board and to reviewing courts the delicate task of striking a balance between “the right of labor organi-

* The proviso was added because it was feared that the deletion of the word “concerted” from the 1947 provision might be construed as overruling *National Labor Relations Board v. International Rice Milling Co.*, 341 U.S. 665, which held immune from Section 8(b)(4)(A) not only picketing at the primary employer’s plant but also the inducement of truck drivers, employed by other employers, as they approached the picketed premises. See *Local 761, International Union of Electrical Workers v. National Labor Relations Board*, 366 U.S. at 681; 106 Cong. Rec. 16589, II *Leg. Hist. of the Labor-Management Reporting and Disclosure Act*, 1959 (G.P.O., 1959) 1707.

† See Hellerstein, *Secondary Boycotts in Labor Disputes*, 47 *Yale L.J.* 341 (1938); 93 Cong. Rec. 4198-4199, 2 *Leg. Hist. of the Labor Management Relations Act*, 1947 (G.P.O. 1948), pp. 1106-1109.

zations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board v. Denver Bldg. Trades Council*, 341 U.S. 675, 692. Since the "objectives of any picketing include a desire to influence others from withholding from the employer their services or trade," *General Electric, supra*, at 673, the distinction between legitimate primary and prohibited secondary activity "does not present a glaringly bright line." Accordingly, while the "secondary boycott" problem has given rise to a substantial body of litigation, both in the Board and in the courts, the scope of the two basic concepts has remained a matter of considerable uncertainty. The labyrinthine history of this litigation is summarized in the majority and dissenting opinions below and in more elaborate detail elsewhere.* It is unnecessary to repeat the story here. This is a simple—indeed, elementary—case of picketing at the scene of a labor dispute to induce railroad men approaching the struck plant not to make pickups and deliveries there. That such picketing, even though addressed to the employees of a neutral employer, is traditional primary conduct was confirmed by this Court two years ago in the *General Electric* case. That decision is wholly dispositive of the present case and requires a reversal of the decision below.

* See, e.g., Lesnick, *The Gravamen of the Secondary Boycott*, 62 Col. L. Rev. 1363 (1962); Koretz, *Federal Regulation of Secondary Strikes and Boycotts—Another Chapter*, 59 Col. L. Rev. 125 (1959); Note, 45 Geo. L. J. 614 (1957).

THE UNION'S PICKETING AT THE GATE THROUGH WHICH THE RAILROAD GAINED ACCESS TO THE STRUCK PLANT WAS TRADITIONAL PRIMARY PICKETING PROTECTED BY THE PROVISIO TO SECTION 8(b)(4)(B) OF THE NATIONAL LABOR RELATIONS ACT.

1. Picketing at an industrial plant involved in a labor dispute has traditionally been conducted by labor unions in the hope of isolating the offending employer from a variety of normal business relationships. It seeks to cut off his labor supply by inducing present employees to cease work and prospective employees not to enter the plant. It attempts to turn away servicemen of all kinds, such as electricians and plumbers doing maintenance work. It may deter customers or servicemen. It is aimed at pickups and deliveries, whether by rail or truck, common or private carrier. To all who would enter the plant, the conventional plea is not to cross the picket line. In its simplest form such primary picketing is addressed indiscriminately to everyone approaching the struck plant. No one, as we understand the contentions, suggests that such picketing is unlawful even when addressed to a truckdriver making deliveries on behalf of a neutral employer. *National Labor Relations Board v. International Rice Milling Co.*, 341 U.S. 665.

The size and complexity of the modern industrial plant makes it possible to have employees enter at one gate, to make shipments and receive deliveries at a second, and to have salesmen and customers use a

third. The argument has sometimes been advanced that picketing at the separate gate where pickups and deliveries are made violates Section 8(b)(4) because it is not directed at employees of the struck employer. That argument was flatly rejected in *Local 761, International Union of Electrical Workers v. National Labor Relations Board (General Electric Co.)*, 366 U.S. 667.

In that case, the union, in furtherance of a lawful strike against General Electric, picketed all the entrance gates to the General Electric plant, including a gate which the company had reserved for exclusive use by the employees of independent contractors who were performing a variety of tasks—e.g., construction work, retooling, and general maintenance—at the premises. The sole issue was the lawfulness of the picketing at the separate gate. Since that gate was 550 feet away from the nearest gate available to the company's own personnel and had been set apart for the avowed purpose of insulating those personnel from the contractors' frequent labor disputes, it was plainly unnecessary for the union to picket there in order to make an effective appeal to the primary employees. Indeed, the union so stipulated. The Board found, therefore, that the union's object was to "enmesh [the] employees of the neutral employers in its dispute with the Company." On that ground alone—the same ground upon which the court of appeals rested its decision here—the Board held that the picketing was forbidden by the statute. The court of appeals affirmed the Board's decision. 278 F. 2d 282 (C.A.D.C.).

In this Court, the union took the position, reflected in some of the early Board cases,* that any picketing conducted at the primary premises is automatically primary. The company, on the other hand, relied upon the principle which forms the keystone of the Second Circuit's decision in the present case—i.e., that every appeal to secondary employees is automatically secondary. This Court rejected both positions. It pointed out that "the location of the picketing at the primary employer's premises [is] 'not necessarily conclusive' of its legality" (366 U.S. 679). At the same time, however, the Court made it abundantly clear that not all picketing directed at secondary employees is unlawful. "[P]icketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer" (366 U.S. 673-674). The key to the problem, the Court stressed,

* * * is found in the type of work that is being performed by those who use the separate gate. It is significant that the Board has since applied its rationale, first stated in the present case, only to situations where the independent workers were performing tasks

* See *Oil Workers International Union, Local 346 (The Pure Oil Co.)*, 84 NLRB 315 (1949); *United Electrical Radio and Machine Workers, Local 813 (Ryan Construction Corp.)*, 85 NLRB 417 (1949). See also *Newspaper & Mail Deliverers' Union (Interborough News Co.)*, 90 NLRB 2135 (1950).

unconnected to the normal operations of the struck employer—usually construction work on his buildings. In such situations, the indicated limitations on picketing activity respect the balance of competing interests that Congress has required the Board to enforce. *On the other hand, if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations.* * * * (366 U.S. 680-681) [Emphasis added.]

Since the Board had failed to recognize that the picketing at the separate gate would be lawful if that gate was used to any significant degree by "employees of independent contractors who performed conventional maintenance work necessary to the normal operations of General Electric" (*id.* at 682), this Court remanded the case for a determination of that critical question of fact. Upon remand, the Board found that the work was of such character as to make the picketing primary. 138 N.L.R.B. No. 38, 342.

Whether or not the reasoning in *General Electric* would go so far as to justify picketing addressed to secondary employees at a site far removed from the scene of the primary labor dispute, such as the place where the secondary employer independently carries on his own separate business, need not be decided in this case. Whatever else it may have held, the Court in *General Electric* held at the very least that a striking union may lawfully establish a picket line

at the primary employer's place of business in an effort to persuade neutral employees approaching the plant not to perform services—*e.g.*, pickups or deliveries or routine maintenance work—which are part of the offending employer's normal operations. The principles and precedents involving picketing at the common site in which two employers regularly and continuously carry on their independent businesses¹⁰ are inapplicable where the second employer's only function is to make deliveries or to pick up goods at the struck plant, or to perform there other tasks related to its normal operation. They apply "only to situations where the independent workers [are] performing tasks unconnected to the normal operations of the struck employer—usually construction work on his buildings" (366 U.S. at 680).

2. There is no meaningful distinction between the instant case and *General Electric*. As we have indicated (*supra*, pp. 3-4), the Carrier plant is bounded on

¹⁰ See *Sailors' Union of the Pacific (Moore Drydock Co.)*, 92 NLRB 547, 548 (1950); *National Labor Relations Board v. Denver Bldg. Trades Council*, 341 U.S. 675; *International Brotherhood of Electrical Workers v. National Labor Relations Board*, 341 U.S. 694; *National Labor Relations Board v. Local Union No. 55 (PBM)*, 218 F. 2d 226 (C.A. 10). See also *National Labor Relations Board v. Local 294, International Brotherhood of Teamsters*, 284 F. 2d 887 (C.A. 2); *Sales Drivers, Local 859 v. National Labor Relations Board (Campbell Coal Co.)*, 229 F. 2d 514 (C.A. D.C.), certiorari denied, 351 U.S. 972, Board's order subsequently enforced, *sub nom Truck Drivers, Local 728 v. National Labor Relations Board*, 249 F. 2d 512 (C.A. D.C.), certiorari denied, 355 U.S. 958; *National Labor Relations Board v. General Drivers, Local 968 (Otis Massey Co.)*, 225 F. 2d 205 (C.A. 5), certiorari denied, 350 U.S. 914.

the west by Thompson Road, a public thoroughfare, and on the south by the right-of-way owned by the New York Central, a strip of land thirty-five feet wide. On that strip, the railroad maintains a spur track which serves the Carrier plant as well as other industrial plants nearby. Both the Carrier premises and the railroad right-of-way are enclosed within the same chain-link fence, which runs from north to south along the Thompson Road frontage of the plant premises and then extends from west to east along the southern side of the right-of-way. The spur track is accessible only through a gate in the chain-link fence at the point where the track crosses Thompson Road. The gate is padlocked when not used by the railroad and is closed both to Carrier employees and the general public. The disputed picketing in this case took place on Thompson Road immediately outside the railroad gate. The pickets did not attempt to interfere with the performance of the railroad switching service to and from plants other than Carrier, but sought merely to induce the railroad and its personnel to refrain from picking up loaded freight cars at the Carrier plant and replacing them with empty cars. These services, as the Board found (R. 366), were related to Carrier's normal operations.

These circumstances make it evident that the picketing at the railroad gate was indistinguishable in any significant respect from the picketing ultimately held to be lawful in *General Electric*, or, for that matter, from the picketing that was carried on at the gates used by truck drivers to make deliveries to the Carrier plant. In all three instances, the union addressed

its appeal to neutral employees as they approached the struck premises. In each case, the pickets were stationed on a public thoroughfare immediately outside an entrance gate in the enclosure which surrounded the struck plant. The railroad personnel, like the truck drivers, and like the maintenance workers in *General Electric*, performed tasks at the struck plant which aided the normal operations of the primary employer's business. The railroad men, like the truck drivers, were urged to discontinue their services to Carrier but not to any other employer. The effect of the picketing at the railroad gate upon the New York Central Railroad was identical in character to the effect of the admittedly lawful picketing upon the independent contractors whose employers serviced General Electric's machines and upon the neutral employers whose drivers made truck deliveries to the Carrier plant.

The court below distinguished the *General Electric* case on the sole ground that the 35-foot strip of land on which the railroad gate was located was owned by the New York Central, whereas the driveways to which the gates in *General Electric* gave access were owned by General Electric itself. But, whatever significance the ownership of the picketed premises may have in other situations, it plainly has none in a case such as this, where the properties of the primary and secondary employees are contiguous and, indeed, enclosed by the same fence. Here, as in *General Electric*, the picketing took place on a public way. The pickets made their appeal to the neutral employees as close as they possibly could to the struck premises without

trespassing upon private property. In these circumstances, the fact that title to the right-of-way was held by the railroad was wholly immaterial. From every practical or functional standpoint, whether in terms of labor relations or practical business operations, it made no difference whether the tracks were on land owned by Carrier or by the railroad. The frequent references, in Board and court opinions, which suggest that picketing may make a deliberate appeal to neutral employees only where it occurs at the premises of the primary employer, involve cases where the picketing takes place at a site, usually far removed from the primary employer's plant, where the secondary employer is engaged, not merely in servicing the primary employer's operation, but in his own business.¹¹ In these situations, the interest of the second-

¹¹ See *National Labor Relations Board v. United Brotherhood of Carpenters*, 184 F. 2d 60 (C.A. 10), certiorari denied, 341 U.S. 947; *National Labor Relations Board v. Local 294, International Brotherhood of Teamsters*, 284 F. 2d 887 (C.A. 2); *Truck Drivers, Local 728 v. National Labor Relations Board*, 249 F. 2d 512 (C.A. D.C.), certiorari denied, 355 U.S. 958; *National Labor Relations Board v. International Hod. Carriers, Local No. 1140*, 285 F. 2d 397, 401 (C.A. 8), certiorari denied, 366 U.S. 903; *Superior Derrick Corp. v. National Labor Relations Board*, 273 F. 2d 891 (C.A. 5), certiorari denied, 364 U.S. 816; *Sailors' Union of the Pacific (Moore Drydock Co.)*, 92 NLRB 547 (1950); *Brewery and Beverage Drivers, Local 67 (Washington Coca Cola Bottling Works)*, 107 NLRB 299 (1953); *Retail Fruit & Vegetable Clerks' Union (Crystal Palace Market)*, 116 NLRB 856 (1956). Cf., however, *Seafarers International Union v. National Labor Relations Board (Salt Dome Production Co.)*, 265 F. 2d 585 (C.A. D.C.); *Local 861, International Brotherhood of Electrical Workers (Plauche Electric, Inc.)*, 135 NLRB 250 (1962).

ary employer is such that he may well be entitled to be insulated against purposeful involvement in the primary dispute. But the mere use by the railroad of the right-of-way to perform tasks auxiliary to Carrier's everyday operations can no more be regarded as an independent business of the railroad, warranting protection against the Union's picketing, than could the use of the driveways by the trucks making deliveries at the other Carrier gates. That was the teaching of *General Electric*.

A contrary rule would make it possible for any employer to prevent appeals to neutral employees performing routine deliveries or maintenance services at the plant, merely by deeding to the secondary employers certain of the driveways and parking areas leading to the plant. Indeed, it is noteworthy that the railroad right-of-way in this very case was formerly owned by Carrier and later transferred to the railroad. It would be absurd, we submit, to hold that picketing at the railroad gate for the purpose of persuading railroad personnel not to serve the struck plant—picketing which would undeniably have constituted primary activity at the time when Carrier owned the right-of-way—became secondary activity the moment title changed hands. The passage of title is a fortuitous circumstance bearing no relationship whatever to the considerations which ought to determine where the line between primary and secondary activity should be drawn.

3. One further point deserves mention. Carrier argued in the court below that to uphold the picket-

ing at the railroad gate would thwart the congressional intent to extend the protection against secondary boycotts to railroads and their employees. That contention is groundless.

Under the original Section 8(b)(4)(A), which made it unlawful to induce "the employees of any employer" to engage in a secondary work stoppage, there was a question as to whether this prohibition applied to secondary boycotts effected through the inducement of railroad employees, since railroads and their employees were excluded from the definition of "employer" and "employee" in Sections 2(2) and 2(3) of the Act.¹² Congress, in 1959, made it clear that it intended to reach secondary boycotts achieved through pressure against non-statutory employees, such as railroad workers, as well as those achieved through pressure against statutory employees. Thus, it amended Section 8(b)(4) to proscribe the inducement of secondary work stoppages by "any individual employed by any person engaged in commerce or in an industry affecting commerce."¹³ However, as pointed out by Chief Judge Lumbard in his dissent below (R. 418), "nothing in the statute or its history indicates an intent to give railroads greater protection in this regard than other employers because of their status as common carriers or for any

¹² See *International Woodworkers of America (W. T. Smith Lumber Co.)*, 116 NLRB 1756, reversed, 246 F. 2d 129 (C.A. 5); *Lumber & Sawmill Workers (Great Northern Railway Co.)*, 122 NLRB 1403, reversed, 272 F. 2d 741 (C.A. 9).

¹³ See 105 Cong. Rec. 14347, 16589, 18022; II *Leg. Hist. of the Labor-Management Reporting and Disclosure Act, 1959* (G.P.O., 1959) 1522-1523; 1706-1707, 1712.

other reason." In sum, the purpose of the 1959 amendments was to afford railroads the same protection against secondary boycotts which other employers enjoyed, not to shield them against the effects of legitimate primary activity.

II

THE ALLEGATIONS OF VIOLENCE HAVE NO BEARING UPON THE STATUS OF THE PICKETING UNDER SECTION 8(b)(4)

There is no merit to Carrier's contention that the picketing at the railroad gate cannot be regarded as legitimate primary activity because it was accompanied by force and violence. The precise contention was rejected in *National Labor Relations Board v. International Rice Milling Co.*, 341 U.S. 665, 672:

In the instant case the violence on the picket line is not material. * * * To reach it, the complaint more properly would have relied on § 8(b)(1)(A) or would have addressed itself to local authorities. The substitution of violent coercion in place of peaceful persuasion would not in itself bring the complained-of conduct into conflict with § 8(b)(4). It is the object of the union encouragement that is proscribed by that section, rather than the means adopted to make it felt. [Footnotes omitted.]

So here, the force and violence at the railroad gate could have been, and were indeed, checked under

Section 8(b)(1)(A) and state processes.¹⁴ But, as in *Rice Milling*, it has no bearing on whether the Union's picketing was primary or secondary for purposes of Section 8(b)(4)(B). Nor is a different conclusion required by the fact that the old Section 8(b)(4) merely made it unlawful to induce work stoppages by secondary employees, whereas the new Section 8(b)(4) also makes it unlawful "(ii) to threaten, coerce, or restrain any person." Clause (ii) is linked to the objects defined in the succeeding subparagraphs, and subparagraph (B), the one relevant here, has a proviso which, we have shown (pp. 11-12, *supra*), specifically protects primary activities. Hence, it is not enough that the means utilized might meet the requirements of clause (ii); to violate Section 8(b)(4)(B), the activity must also have the secondary object proscribed by (B). In sum, as Chief Judge Lumbard pointed out (R. 417-418), "the distinction between primary and secondary picketing is based, as it was in cases arising under the statute prior to the 1959 amendment, on a consideration of the union's objective. * * * It is this distinction, not a

¹⁴ The Board found that, by such conduct, the Union violated Section 8(b)(1)(A) of the Act, entered an appropriate remedial order, and the Union consented to the entry of decree enforcing that order (n. 5, *supra*). The Union was also subject to an injunction issued in state court proceedings which, *inter alia*, limited the places and extent of picketing and enjoined violent or disorderly conduct. (R. 418, n. 4.)

distinction between peaceful and violent means, which adjusts the conflicting interests of the union and neutral employees for purposes of § 8(b)(4)."

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case remanded with directions to enter a decree denying Carrier's petition to review and set aside the Board's order dismissing the complaint.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
HANS J. LEHMANN,
Attorney,
National Labor Relations Board.

SEPTEMBER, 1963.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 2. When used in this Act—

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any in-

dividual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Sec. 8. . . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7:

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . .

OCT 22 1963

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND
LOCAL UNION 5895, UNITED STEELWORKERS OF
AMERICA, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

AND

CARRIER CORPORATION

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT,
CARRIER CORPORATION

GREGORY S. PRINCE

PHILIP F. WELSH

CARL V. LYON

929 Transportation Building

Washington 6, D. C.

Counsel for the Association

Of American Railroads,

Amicus Curiae.

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In the Supreme Court of the United States

No. 89

**UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND
LOCAL UNION 5895, UNITED STEELWORKERS OF
AMERICA, AFL-CIO,**

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

AND

CARRIER CORPORATION

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, CARRIER CORPORATION

The Association of American Railroads hereby files its Brief *amicus curiae* in this case, pursuant to Rule 42(2) of the Rules of the Supreme Court. The Brief is accompanied by written consent to its filing from the Solicitor General of the United States on behalf of the National Labor Relations Board, the United Steelworkers of America, AFL-CIO, and Local Union 5895, United Steelworkers of America, AFL-CIO, and Carrier Corporation. These are all of the parties in the case.

I. INTEREST OF AMICUS CURIAE

The Association of American Railroads (hereinafter referred to as the A.A.R.) is a voluntary, unincorporated, nonprofit organization composed of member railroad com-

panies operating in the United States, Canada, and Mexico. The member railroads operate more than 95 per cent of the total railroad mileage and have operating revenues of approximately 98 per cent of the total railroad operating revenues of all railroads in the United States. The activities of the A.A.R. cover a wide range, having to do with such matters as research, operations, car service, safety, public relations, accounting, statistics, law, and Federal legislation and regulation, insofar as those matters require joint handling in the interest of safe, adequate and efficient railroad service to the public.

The A.A.R. is the joint representative and agent of these railroads in connection with Federal legislation and with legal matters of common concern to the industry as a whole. It has an interest in significant interpretations of Federal legislation that will apply generally to all of its members. The issues raised in the present case relating to the proper construction of the secondary boycott provisions of the National Labor Relations Act are important to the entire railroad industry.

II. INTRODUCTORY STATEMENT

The Court of Appeals for the Second Circuit decided that the unions representing Carrier Corporation employees violated section 8(b)(4)(B) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. §§ 151, et seq.), by the activities directed against the New York Central Railroad, found by the Trial Examiner and the National Labor Relations Board. Those activities took place at a typical railroad industrial lead track, located on railroad property, over which the railroad performed its common carrier obligation to four major industries, General Electric, Western Electric, Brace-Mueller-Huntley, and Carrier Corporation. Briefly, the unions interfered with the railroad's service to Carrier Corporation by picketing on the railroad's right-of-way, obstructing train movements in and

out of the lead track area by massing about the locomotives and cars, placing an automobile on the tracks in front of the train, lying down on the tracks in front of the train, and threatening train-crew personnel with physical violence. (Joint Appendix, pp. 82, 86-92, 94, 104, 136, 316, 319-325; General Counsel's Exhibits 6, 7, 9).

We think that those activities violated the secondary boycott provisions of the statute for reasons set out in the Brief of Carrier Corporation. We agree with those reasons and adopt them. There are several points, however, that we would like to emphasize that have a bearing on the issues before the Court.

III. POINTS MADE BY AMICUS CURIAE

1. The 1959 amendments of the secondary boycott provision were enacted to close a loophole that deprived railroads of needed protection from interference by striking industrial pickets.

2. The Court of Appeals correctly decided that the railroad's ownership of the right-of-way at which the union's activities took place was a material and significant fact in determining that those activities violated section 8(b)(4) (B) of the National Labor Relations Act.

IV. ARGUMENT

POINT 1

The 1959 Amendments of the Secondary Boycott Provision Were Enacted to Close a Loophole that Deprived Railroads of Needed Protection from Interference by Striking Industrial Pickets

Railroads are under a statutory and common law duty to render transportation service to shippers who request it, and the fact that a shipper's employees are on strike and may seek to prevent performance of service by the railroad will not necessarily excuse failure of the railroad to

perform. Railroads have a statutory duty to provide transportation service on reasonable request under section 1(4) of the Interstate Commerce Act,¹ and are subject to statutory liability in damages for failure to perform it.² They have been held liable in damages for failing to furnish service as required by statute, even though their failure resulted from a strike and picket line at the shipper's place of business. *Minneapolis & St. Louis Ry. Co. v. Pacific Gamble Robinson Co.*, 215 F.2d 126, (8th Cir., 1954). Under the common law, railroads are also duty-bound to furnish transportation and have been held liable in damages for non-performance, although failure resulted from a protracted dispute between the shipper and its own employees in which the shipper's premises were picketed. *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F.Supp. 475 (D.C. Oregon, 1953) and cases cited therein. In *Montgomery Ward, supra*, it made no difference that as between the shipper and its employees, the shipper was at fault for engaging in unfair labor practices (128 F.Supp., at p. 489); the shipper still recovered from the railroad. Efforts by railroads and other common carriers to limit their duty to serve and thus their liability to shippers by tariff rules providing that service will not be rendered at strike-bound plants have been disapproved by the I.C.C. *Pickup and Delivery Restrictions, California Rail*, 303 I.C.C. 579 (1958).

It is true that the duty to furnish transportation is not unlimited. A railroad may be relieved by the fact or apparent probability of substantial physical danger to its em-

¹ 49 U.S.C. § 1(4) (54 Stat. 900 (1940)) provides, in part: "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor..."

² 49 U.S.C. § 8 (24 Stat. 382 (1887)) provides, in part, as follows: "that in case any common carrier subject to the provisions of this part... shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part..."

employees in a strike situation. *Meier & Pohlmann Furniture Co. v. Gibbons*, 233 F.2d 296, (8th Cir., 1956) cert. den. 352 U.S. 879. As formulated by the 8th Circuit in *Pacific Gamble Robinson*, *supra*, the test is whether the shipper's request for service is reasonable in the light of all circumstances, as to which the Court said (215 F.2d, at p. 132):

"It would hardly be a reasonable request for carrier service, for a shipper to demand in effect, by virtue of that result necessarily being inherent in any attempted compliance, that a railroad require its employees to spill their blood in his existing strike situation, or that it compel them to subject themselves and their families to a real and substantial danger of retaliatory bodily harm in their outside life from his striking employees.

"That much, public policy, social dignity, and congressional concern for the safety and welfare of carrier employees as reflected in the spirit of modern railway-labor and other legislation, would seem inescapably to command."

The difficulties in applying this rule to concrete situations are evident. Will the situation require railroad employees "to spill their blood," or will it not? Will employees "subject themselves and their families to a real and substantial danger of retaliatory bodily harm in their outside life" from the strikers? How can railroad management possibly answer such questions with assurance? A management which resolves doubts in favor of safety, runs the risk that a later trier of facts (as in *Pacific Gamble Robinson*) will hold it liable in damages. The mere presence of a picket line, without violence, is no excuse at all. *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, *supra*.

The problem presented by the case before the Court is chronic in the railroad industry. Cases of interference with railroad service by striking industrial pickets occur fre-

quently.³ Strikers prevent or deter railroads from furnishing service at industrial plants by maintaining pickets at points where railroad sidings enter the plants or at points on railroad lines approaching those entrances, and the pickets appeal to train crews not to move cars in and out. Pickets trespass on railroads' privately-owned rights-of-way to appeal to train crews. They mass about locomotives and cars to impede and prevent their movement. Tracks are sometimes blocked, as in this case, by automobiles and human bodies, and train crews are threatened with physical violence. Actual violence is sometimes used against train crews. As the New York Central did here, railroads attempt to run their trains with supervisory personnel when regular crews, whose members belong to railroad labor organizations, refuse to cross picket lines. In all of these situations, the labor dispute between the shipper and his employees has nothing to do with the railroad or the railroad unions; there is no community of interest between the striking employees and the railroad labor organizations.

The railroads felt that they were entitled to relief from

³ *Atchison, T. & S.F. Ry. v. Iron Workers Local 546*, 26 LRRM 2367 (D.C. Okla. 1950); *Atchison, T. & S.F. Ry. v. Sillampa*, 26 LRRM 2310 (D.C. N.M. 1949); *sub nom., Smotherman v. United States*, 186 F.2d 676 (10th Cir. 1950), 27 LRRM 2219; *Baltimore & O. R.R. v. Marine Engineer's Ben. Assn.*, 40 LRRM 2313 (Md. Cir. Ct. 1957); *Erie R.R. v. Longshoremen, I.L.A.*, 117 F.Supp. 157 (D.C. W. N.Y. 1953), 33 LRRM 2234; *Illinois Central R.R. v. Teamsters Local 568*, 90 F.Supp. 640 (D.C. W.La. 1950), 26 LRRM 2246; *In Re Missouri Pacific*, 25 LRRM 2135 (D.C. E.Mo. 1948); *Knapp v. Steelworkers*, 179 F.Supp. 90 (D.C. Minn. 1959), 45 LRRM 2003; *Louisville & N. R.R. v. Railroad Trainmen*, 35 LRRM 2615 (Ky. Cir. Ct. 1955); *Lumber & Sawmill Workers Local 2409*, 122 N.L.R.B. 1403 (1959), 43 LRRM 1324; *rev'd. sub nom., Great Northern Ry. v. N.L.R.B.*, 272 F.2d 741 (9th Cir. 1959), 45 LRRM 2206; *Great Northern Ry. v. Lumber & Sawmill Workers Local 2409*, 140 F.Supp. 393 (D.C. Mont. 1955), *aff'd*, 232 F.2d 628 (9th Cir. 1956); *Missouri Pacific R.R. v. Brick & Clay Workers Local 602*, 238 S.W. 2d 945 (Ark. S.Ct. 1951), 27 LRRM 2573; *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 123 F.Supp. 475 (D.C. Ore. 1953); *Pacific Gamble Robinson Co. v. Minneapolis & St.L. Ry.*, 106 F.Supp. 794 (D.C. Minn. 1952); *aff'd. in part, sub nom., Minneapolis & St. L.*

these practices, and in the course of the hearings in 1959 before the House Committee on Labor and Education on legislation that was finally enacted as the Labor-Management Reporting and Disclosure Act of 1959, the railroad industry requested Congress to provide relief for its problem.⁴ Congress provided such relief by enacting the secondary boycott provisions now contained in § 8(b)(4)(i) and (ii)(B).

The original secondary boycott provision, § 8(b)(4) of the Labor-Management Relations Act (29 U.S.C. § 158(b)(4)), declared it to be an unfair labor practice for a labor organization or its agents to engage in or to induce or encourage "the employees of any employer" to engage in, a strike or a concerted refusal in the course of their employment to do certain things for prohibited purposes specified in the statute. § 2(2) of the Labor-Management Relations Act (29 U.S.C. § 152(2)) provides that the term "employer" shall not include "any person subject to the Railway Labor Act . . ." § 2(3) (29 U.S.C. § 152(3)) provides that the term "employee" shall not include "any individual employed by an employer subject to the Railway Labor

Ry. v. Pacific Gamble Robinson Co., 215 F.2d 126 (8th Cir. 1954); *Penello v. Seafarers Int'l Union*, 164 F.Supp. 635 (D.C. E.Va. 1957), 40 LRRM 2180; *Seafarers Int'l Union*, 122 N.L.R.B. 52 (1958), 43 LRRM 1063; *rev'd. Superior Derrick Corp. v. N.L.R.B.*, 273 F.2d 891 (5th Cir. 1960), 345 LRRM 2506; *International Brotherhood of Teamsters, Local 201*, 84 N.L.R.B. 360 (1949), 24 LRRM 1254; *sub nom., International Rice Milling Co. v. N.L.R.B.*, 183 F.2d 21 (5th Cir. 1950), 26 LRRM 2295; *rev'd.* 341 U.S. 665 (1951); *Teamsters v. Missouri Pacific R.R.*, 27 LRRM 2576 (Ark. S.Ct. 1951); *Wichita Falls R.R. v. Machinists*, 266 S.W. 2d 265 (Tex. Ct. Civ. App., 1954), 33 LRRM 2609; *Woodworkers Local S-426*, 116 N.L.R.B. 1756 (1956), 39 LRRM 1082; *rev'd sub nom., W. T. Smith Lumber Co. v. N.L.R.B.*, 246 F.2d 129 (5th Cir. 1957), 40 LRRM 2276; *Le Bus v. Woodworkers Local S-426, S-429*, 142 F.Supp. 875 (D.C. N. Ala. 1956), 38 LRRM 2441).

⁴ Statement of Waldron A. Gregory, *Hearings before a joint subcommittee of the Committee on Labor and Education, House of Representatives*, on H.R. 3549, H.R. 3302, H.R. 4473 and H.R. 4474, 86th Cong., 1st Sess., Part 5, at p. 1846 (1959).

Act." Construing the secondary boycott provisions with the statutory definitions of "employer" and "employee," the National Labor Relations Board concluded that there was no violation of the statute if a labor organization induced or encouraged the employees of a railroad to engage in a strike or concerted refusal to perform work for the purposes set out in the statute. *International Brotherhood of Teamsters (The International Rice Milling Co.)*, 84 N.L.R.B. 360 (1949); *International Woodworkers of America (W. T. Smith Lumber Co.)*, 116 N.L.R.B. 1756 (1956); *International Brotherhood of Teamsters (The Alling & Cory Company)*, 121 N.L.R.B. 315 (1958); *Lumber & Sawmill Workers Local Union 2409 (Great Northern Railway Co.)*, 122 N.L.R.B. 1403 (1959). The National Labor Relations Board persisted in this view despite the uniform refusal of courts of appeal to agree with it. *International Rice Milling Co. v. N.L.R.B.*, 183 F.2d 21 (5th Cir., 1950); *W. T. Smith Lumber Co. v. N.L.R.B.*, 246 F.2d 129 (5th Cir., 1957); *Great Northern Railway Co. v. N.L.R.B.*, 272 F.2d 741 (9th Cir., 1959). Each of the foregoing Court of Appeals cases involved picketing of railroads and railroad sidings adjacent to the place of business of the primary employer with which the union was involved in a labor dispute, and in each of them the Court of Appeals found such picketing to be violative of the statute.

Then Congress enacted the Labor-Management Reporting and Disclosure Act of 1959, which contained several amendments of the secondary boycott provisions. One of these amendments made it an unfair labor practice for a labor organization to induce or encourage "any individual employed by any person engaged in commerce" to do certain things, instead of "the employees of any employer." The purpose of this change was to solve the difficulty that arose when the N.L.R.B. construed the original secondary boycott provisions in conjunction with the statutory definitions of "employer" and "employee," and to extend to

railroads and certain other employers the protection from secondary boycotts that employers in general had.

There is no doubt that Congress acted to eliminate a loophole in the law with respect to secondary boycott protection for railroads. Senator Morse, in speaking of his willingness to accept some modifications on the subject of secondary boycotts, said:

"Similarly [sic], a secondary boycott carried out by inducing railroad employees should not be permitted, merely because the employees' employer is not covered by the Act." (Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, volume II, page 1426).

Also, then Senator Kennedy and Congressman Thompson prepared an analysis of the secondary boycott amendments contained in the Landrum-Griffin bill after it passed the House, which analysis contained the following statement:

"1. Railroad, Airline, and Public Employees

"The NLRA definitions of 'employer' and 'employee' exclude various special categories of employees among them agricultural workers, Government employees and employees of railroads and airlines who are subject to the Railway Labor Act. Since Section 8(b)(4) presently speaks of inducing 'the employees of any employer,' it does not apply to these groups.

"The House bill extends the prohibition to secondary boycotts by agricultural workers, Government employees and employees of railroads and airlines. Apparently the theory is that the omission was simply a mistake in the original draftsmanship.

"The unions argue that since these groups receive none of the benefits of the NLRA they should be subjected to none of the burdens. The railway labor organizations particularly dislike the prospect of involvement with the NLRB. These arguments have some appeal but they do not carry much weight since the

employees who would be forbidden to engage in secondary boycotts have little to gain or lose from such activity.

"We could not seriously object to revising the present law in this respect." (Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, volume II, pages 1706-7).

In an analysis of the conference agreement by Congressman Griffin, one of the authors of the House bill, the following statement appears with respect to the secondary boycott amendment:

"3. Closes loopholes which permitted secondary boycotts involving railroads, municipalities, and governmental agencies because their employees were not 'employees' under definition in the act." (Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, volume II, page 1712).

As is clear from the legislative history, Congress acted to eliminate a loophole in the secondary boycott provisions of the law. The fact that such a loophole existed had been manifested in the cases before the N.L.R.B. in which the Board decided that railroads were not entitled to protection. Those cases involved, typically, interference by striking pickets with the performance of railroad service at struck plants and on railroad sidings and rights-of-way adjacent to those plants. In short, they were cases like this one. The logical conclusion is that Congress, in closing this loophole, meant the amended statute to apply in such situations.

Additional light is shed on the meaning of the 1959 secondary boycott amendments by other portions of their legislative history. The amendment of statutory language from "employees of any employer" to "any individual employed by any person" did not appear in the bill passed by the Senate (S. 1555), although it appeared in another Senate labor reform bill supported by the Administration.

(S. 748); it likewise appeared in the bill that finally passed the House of Representatives, and it remained in the bill that was reported from the conference of the Senate and the House and that was agreed to by the Senate and the House. In the course of debate on the floor of the Senate on the Senate bill that had been reported out of committee (S. 1555), Senator Dirksen proposed a series of amendments, including this particular change that would have made the secondary boycott provision applicable to railroads and railroad employees.³ This particular amendment was explained to the Senate by Senator Goldwater, who was a Senate proponent of this and other Taft-Hartley Act amendments, in the following language:

"The present secondary boycott provisions of the act also give no protection to railroads or agricultural enterprises since they are excluded from the term 'employer' as defined in the act. Thus, unions which have stopped railroad employees, agricultural workers, and municipal employees from their normal activities in order to retaliate against some other employer have been immune from the act.

"The word 'person' is used in the proposed amendment to the secondary boycott provision rather than 'employer,' in order to extend the protection of the secondary boycott provisions of the act to public employers, railroads, or agricultural enterprises without subjecting them to other provisions of the act." (105, Cong. Rec., p. 6428 (1959))

Senator Dirksen's proposed amendments were thereafter rejected by the Senate (105 Cong. Rec., p. 6435 (1959)). The bill later passed by the Senate contained no secondary boycott amendments. Minority views were filed to the Senate committee report by Senator Dirksen and Senator Goldwater, who criticized the bill for its failure (among

³ 105, Cong. Rec., pp. 6411-6412 (1959).

other things) to eliminate loopholes in the ban on secondary boycotts in the following language:

"(3) *Boycotts by railroad employees, agricultural workers, Government employees, and other groups now excluded from the secondary boycott ban of the Taft-Hartley Act.*—Under the definition section of the Taft-Hartley Act railroad employees, agricultural workers, and governmental employees are not employees within the meaning of the act. The Board has reached the conclusion that secondary boycotts by these exempt categories, and the inducement of such boycotts are not unfair labor practices. (See *International Rice Milling*, 84 N.L.R.B. 360, and *Di Giorgio Wine*, 87 N.L.R.B. No. 125.)

"Secondary boycotts by these groups are just as much against the public interest as boycotts by anyone else.

"The bill, S. 748, would extend the ban to these excluded categories by use of the words 'any person' instead of the use of the words 'employees of any employer' in section 8(b)(4)(i) and (ii)." (Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, volume I, page 476.)

The significant thing about the above quotation is the fact that it pinpoints and highlights the Labor Board's decision in the *International Rice Milling Co.* case, in which a striking union interfered with railroad service at a siding adjacent to the struck plant. This indicates that the loop-hole-closing amendment of the Taft-Hartley Act in S. 748 and in the amendments offered by Senator Dirksen was intended to provide relief in factual situations illustrated by that case. The language in S. 748, the language of the amendment offered by Senator Dirksen; and, most importantly, the language of the bill enacted into law are all identical in this regard. There is no doubt about the meaning attached to that language by Senator Dirksen and Senator Goldwater: it was intended to protect the railroads and their employees from interference by striking pickets at struck industrial plants.

Further evidence of Senator Goldwater's understanding appears in the following analysis by him of the loophole-closing provision of the bill that was finally passed by Congress:

"Question. Does the new legislation close any other loopholes?

"Answer. The term 'employer' as it's defined in the Taft-Hartley Act excludes certain types of employers. Among them, the most important being railroad employers and their employees, because they are covered under the Railway Labor Act.

"Suppose you get a situation like this: The union has a dispute with Employer A. A, in order to finish his economic processes to make his profit, has got to ship his goods via railroad to its ultimate destination. So the union throws a picket line around the railroad spur at which Employer A's products would normally be loaded onto the freight car. The purpose of that picket line is to induce the railway employees to refuse to load that stuff or to handle it. The Board has said that, under the present language, that is not a violation because railroad employees and railroad employers are not employees or employers under the Taft-Hartley Act.

"Now, under this new bill, instead of using the term, 'to cease doing business with another employer,' it says 'to cease doing business with any other person.' Person includes everybody. That closes that loophole." (Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, volume II, page 1829.)

Senator Goldwater was, as previously noted, a principal proponent in the Senate of an amendment containing the precise language that Congress adopted and enacted; he was also one of the conferees on the part of the Senate in the Senate-House conference committee that was appointed to consider the House and Senate labor bills and that reported a compromise version of the two bills.* His

* 105, Cong. Rec., p. 15965 (1959).

interpretation of its meaning is therefore entitled to substantial weight.

No doubt the N.L.R.B. and the Steelworkers Union recognize that railroads are entitled to some kind of protection under the amended statute. According to their theory of the law, however, such protection would be limited to situations in which the railroad renders service to an employer that is unconnected with the employer's normal business operations, or perhaps when striking unions engage in activities against a railroad at a point physically remote from the struck employer's plant, e.g., at a railroad freight house or at railroad offices. This would, of course, be a drastic limitation of the law. There is no indication whatever that Congress intended the law to have such a limited application. Such a limitation would be contrary to the intent of Congress to extend significant protection to railroads and railroad employees, as is shown by the legislative history. The situation in which railroads pre-eminently need the protection is the one in which they are prevented from serving shippers by the activities of industrial strikers at railroad sidings adjacent to struck plants.

POINT 2

The Court of Appeals Correctly Decided that the Railroad's Ownership of the Right-of-Way at Which the Union's Activities Took Place Was a Material and Significant Fact in Determining that Those Activities Violated Section 8(b)(4)(B) of the National Labor Relations Act

In deciding that the union activities directed against the New York Central Railroad violated Section 8(b)(4)(B) of the National Labor Relations Act, the Court of Appeals for the Second Circuit recognized and gave effect to the fact that the right-of-way where those activities occurred was owned by the railroad. The fact of railroad owner-

ship was considered to distinguish the case from the Supreme Court decision in the *General Electric* case (*Local 761, Int'l. Union of Elec. Workers v. N.L.R.B.*, 366 U.S. 667), in which the Court dealt with the legality of picketing activities at a General Electric plant conducted by striking General Electric employees at a plant entrance owned solely by General Electric. In giving effect to railroad ownership of the right-of-way, the Court of Appeals treated the New York Central Railroad as an adjoining owner of property that was entitled to protection in its business operations from interference and interruption by striking employees of a neighboring business (Carrier Corporation) in whose labor dispute the railroad was not involved. The railroad's relationship to Carrier Corporation at Syracuse was the same as the relationship of an adjoining or neighboring factory that produced a raw material used by Carrier Corporation in manufacturing its products. The fact that such a factory happened to be nearby, in a geographical or physical sense, would be no reason to deny it protection from secondary boycott activities of striking Carrier employees. Likewise, the closeness of the rail right-of-way should not deprive the railroad of such protection.

In briefs filed with this Court, the National Labor Relations Board and the United Steelworkers of America suggest that the railroad company's ownership of its own property is "irrelevant" and "immaterial," that "it made no difference whether the tracks were on land owned by Carrier or the railroad," that "the fact that title to the right-of-way was held by the railroad was wholly immaterial," and that it "made no difference whether the tracks were on land owned by Carrier or the railroad."

The comment of the A.R. with respect to the above-quoted assertions is that the ownership of property is a legal fact of undisputed significance in the law of torts, the law of property, and the law of taxation in the United States, and that it should be given equal recognition in the

Federal law of labor relations. Railroads own a substantial amount of real estate in the form of industrial sidings, many of which were built and are maintained by them at their own expense.⁷ Real estate taxes have been paid on them for years and still are. The fact of railroad ownership should not be blurred or watered down by verbal dilution. The N.L.R.B. Brief, for example, asserts (p. 10) that "the railroad's mere use of the strip adjacent to the Carrier plant to perform tasks which aid Carrier's everyday operations cannot be regarded as an independent business which would warrant protection against the union's picketing." Why "mere" use? The railroad used its right-of-way and *owned* it in the fullest sense of the word. If the railroad is not an "independent business," what is it? How is the railroad less "independent" than any supplier of raw materials to Carrier? In actuality, the New York Central Railroad is legally and factually distinct from and independent of Carrier Corporation and the other businesses with plants located on its industrial lead track, namely, General Electric, Western Electric, and Brace-Mueller-Huntley. The facts of property ownership and legal identity should not simply be waved aside to facilitate the conclusion that the activities of the striking Carrier employees did not violate the National Labor Relations Act.

We urge the Court not to adopt an interpretation of a Federal statute that involves a disregard of the legal ownership of railroad property, and to affirm the decision of the Court of Appeals for the Second Circuit that recognizes and gives effect to such ownership.

⁷ Railroads report their miles of track operated in Annual Reports to the I.C.C., Form A (Schedule 411). Industry sidings are included in the totals for way switching tracks and yard switching tracks. These figures are summarized in the I.C.C.'s "Transport Statistics in the United States" for the year 1961; p. 6, which shows 26,873 miles of way switching tracks and 59,146 miles of yard switching tracks. The industry track component of these totals is not indicated; no exact figures for industry tracks are available.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

GREGORY S. PRINCE

PHILIP F. WELSH

CARL V. LYON

*Counsel for the Association
of American Railroads,
Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has this day been served on each party to this case by mailing copies thereof to the respective counsel of record at their post office addresses, first-class mail, postage prepaid. A copy thereof has also been so mailed to the Solicitor General, Department of Justice, Washington 25, D. C.

GREGORY S. PRINCE

*Counsel for the Association
of American Railroads
Amicus Curiae*

October 23, 1963

SEP 26 1935

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1935

No. 59

UNITED SHIPWORKERS OF AMERICA, AFL-CIO, and Local
1000, UNITED SHIPWORKERS OF AMERICA, AFL-CIO,
Petitioners,

NATIONAL LUMBER RELATIONS BOARD AND CARRIER CORPORA-
TION.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT CARRIER CORPORATION

THOMAS C. KAHNIGOLD
FRANCO F. SULLIVY
105 South La Salle Street
Chicago 2, Illinois

KENNETH C. McGUIVER
1615 H Street, N.W.
Washington 4, D. C.

DAVID W. JAMES
Carrier Parkway
Syracuse 1, New York

JOHN B. LUTCH
Syracuse, New York
Attorneys for Carrier
Corporation

VINCE, PRICE, KAUFMAN & KAHNIGOLD
105 South La Salle Street
Chicago 2, Illinois
Of Counsel

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 89

**UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND LOCAL
5895, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioners,**

v.

NATIONAL LABOR RELATIONS BOARD AND CARRIER CORPORATION.

**On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit**

BRIEF FOR RESPONDENT CARRIER CORPORATION

OPINIONS BELOW

The Opinion of the Court of Appeals, as amended, on Petition for Rehearing (R. 385-418, 438-441) is reported at 311 F.2d. The Decision and Order of the Board (R. 312-373) are reported at 132 NLRB 127.

JURISDICTION

The judgment below was entered on October 18, 1962 (R. 419), and Petitions for Rehearing were denied on December 12, 1962 (R. 443-444). The Petition for Writ of Certiorari was filed on March 12, 1963, and was granted on May 13, 1963 (R. 444). The jurisdiction of this cause rests upon 28 U.S.C. 1254 (1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (sometimes referred to herein as the "Act"), 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*, are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. . . . (b). It shall be an unfair labor practice for a labor organization or its agents—

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is— . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organiza-

tion has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . .

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

QUESTIONS PRESENTED

1. Whether Section 8(b)(4)(B) of the National Labor Relations Act prohibits a union, engaged in primary picketing at an industrial plant, from picketing a railroad's property which is nearby and, in part, adjoins that of the industrial plant with the object of forcing the railroad to cease transporting the products of the industrial plant.

2. Whether the balancing of interests doctrine generally followed in common situs cases under Section 8(b)(4)(B) involving peaceful picketing is applicable under Section 8(b)(4)(ii)(B) where the union conduct complained of consists of threats, restraint and coercion in violation of Section 8(b)(1)(A) of the Act.

STATEMENT OF THE CASE

A. The Facts

On and after March 2, 1960, in support of an economic strike against Carrier Corporation (hereinafter called "Carrier"), the petitioning unions picketed each of the eight plant entrances at Carrier's Thompson Road plant in Syracuse, New York. The picketing was accompanied

by threats and violence on the part of the unions (R. 316; 362-363; G. C. Exh. 9; R. 51, 311).

The Carrier plant fronts on the east side of a north-south highway known as Thompson Road. Behind Carrier's facilities is a plant of the General Electric Company. South of and adjacent to the two plants are east-west railroad tracks of the New York Central Railroad on a right of way owned since 1949 (R. 49, 67, 73, 74) by the railroad. Immediately south of and adjacent to the railroad right of way are two other industrial plants, both fronting on Thompson Road.

The railroad tracks described above serve all four of the above-described plants by a series of spurs and are enclosed by a chain-link fence, which also encloses the Carrier property. In the fence is a railroad gate, also fronting on the east side of Thompson Road, through which trains enter upon and leave the sidings and spurs lying on the railroad property. The railroad gate is on the railroad's right of way and when not being used by the railroad the gate is kept locked, with a key in the possession of railroad personnel. Carrier employees are not permitted access to Carrier property through the railroad gate and right of way (G. C. Exh. 9; R. 51, 311; R. 319, 363).¹

2 Although the railroad employees involved herein were not represented by the unions, petitioners herein, the railroad gate described above was picketed on or about the commencement of the strike (R. 81, 82, 316, 319), and was

¹ The Petitioners' statement of the facts is misleading in that it makes it appear that this railroad gate was but a plant gate of Carrier, the primary employer. Thus, the Petitioners state (Pet. Br., p. 4), that the union "picketed the various entrances to the plant premises. One of the entrances picketed . . . is that which is used by the New York Central Railroad in making pickups and deliveries at Carrier."

the scene of several incidents, the most serious of which took place March 11, 1960. On that date a train, manned by nonsupervisory railroad employees, was stopped at the gate by the pickets and was not permitted to enter until the trainmaster assured the pickets that the Carrier plant would not be served. After switching cars for the other plants; the train—manned this time by railroad supervisors—again attempted to enter upon railroad property through the railroad gate. Thirty to sixty massed pickets—both on the east and west sides of Thompson Road—sought forcibly to restrain the train's movements. Pickets who were lying on the tracks in front of the train had to be removed physically by police officers. A staff representative of the unions drove his automobile onto the track during the switching operation and it, too, had to be removed by police officers before the train could continue. An attempt—attributed to the unions by the Trial Examiner—also was made to damage the train by greasing the track and setting the switch in such a manner as to derail the train. Also, the railroad supervisor in charge of the train was challenged by a union picket to get down off the engine "for the purpose of getting my block knocked off" (R. 82, 86-94, 136, 316, 319-323; G. C. Exh. 6, 7; R. 52, 309, 310).

B. The Decision of the Board

Upon the foregoing facts, the Trial Examiner concluded that the unions had violated Sections 8(b)(4)(i) and (ii) (B) and 8(b)(1)(A) of the Act (R. 325, 327, 335-337, 340). The Board, in agreement with the Trial Examiner, found violations of Section 8(b)(1)(A) of the Act (R. 362, 363).

The Board majority, however, reversed the Trial Examiner with respect to the violations of Section 8(b)(4) and dismissed the portions of the complaint relating thereto

on the ground that *Local 761, Electrical Workers (General Electric Co.) v. N.L.R.B.*, 366 U.S. 667 (1961) (hereinafter sometimes called "*General Electric*"), was dispositive (R. 363-364, 368). The Board majority opinion likened the railroad's gate to a separate gate of a single employer and held that, because the services performed by the railroad were services rendered in connection with the normal operations of Carrier, the Act was not violated (R. 365-366). Member Rodgers dissented, arguing that the majority decision was in direct contravention of the 1959 amendments to the Act; that reliance on *General Electric* was misplaced because property of a secondary employer rather than the "reserved gate" of a primary employer was involved; and that the picketing was peaceful in *General Electric*, rather than accompanied by threats and violence as was true in the instant case (R. 369-371).

C. The Decision of the Court of Appeals

The Court of Appeals for the Second Circuit reversed the decision of the Board as it related to Section 8(b)(4) (i) and (ii)(B), Chief Judge Lumbard dissenting.

After a detailed analysis of the development of secondary boycott law (R. 388-404), the court identified the emergent doctrine as one that required picketing to be conducted in such a manner and at such a place so as to minimize the impact on neutral employees insofar as this could be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees (R. 402-403). The court added (R. 403-404):

The relevance of these principles to the issue before us is clear. In picketing the railroad right of way adjacent to the Carrier plant, the union was not furthering its legitimate objective of publicizing its dispute to Carrier employees. Eight gates on the employer's

premises existed, and were picketed, for this purpose. Carrier employees were not permitted access to the plant through the gate on the railroad right of way. In picketing on the railroad right of way the union demonstrated that its manifest, and sole objective was to induce or to encourage railroad employees, or to coerce the railroad, to refuse to handle Carrier goods or otherwise to deal with the primary employer. Such results, although permissible when merely incidental to the pursuit of legitimate objectives, *DiGiorgio Fruit Corp. v. N.L.R.B.*, 191 F.2d 642 (D. C. Cir., 1951), here involved no such redemptive feature. The actions of the union were thus in violation of § 8(b)(4)(i) and (ii)(B) of the Act.

The Court of Appeals went on to note (R. 406-407) that this Court in *Local 761, Electrical Workers (General Electric Co.) v. N.L.R.B.*, 366 U. S. 667 (1961), found picketing at a reserved gate, on and to an employer's primary premises to be violative of section 8(b)(4)(B) where such gate was exclusively used by employees of neutral employers; but that such finding of illegality was limited to circumstances in which the neutral employees were not engaged in work connected with the normal operations of the plant. The court added (R. 407-408):

In so limiting its holding the Court acknowledged the special solicitude of Congress and the Board that the statute not unduly restrict traditional picketing at the premises of the primary employer. *Local 761 (General Electric)*, *supra*, at 679, 681. (Emphasis by the court)

In this case, however, the union activity occurred on the right of way of the New York Central Railroad. No special policy of greater latitude for picketing at the primary employer's premises thus comes into play, and no distinction based on the work performed by the neutral employees need be made.

We do not find in *General Electric* a policy of the Supreme Court to exempt from the Act's proscrip-

tions all union attempts to keep deliveries from being made to a struck plant, wherever and however such attempts are made. Yet it is this position for which the Board now earnestly contends. Were we to accept such a doctrine, however, we should not be able to distinguish attempts to prevent deliveries from attempts directly to interfere with other business relations between the struck employer and his suppliers or customers. Congress might have written § 8(b)(4) to apply only to union interference with business relations between a struck employer's suppliers and customers and *their* suppliers and customers. It did not do so, nor have the courts failed to find violations of the Act where union activities directly interfered with relations between a struck employer and secondary parties dealing with him. See, e.g., *Local 1976, United Brotherhood of Carpenters (Sand Door & Plywood Co.) v. N.L.R.B.*, 357 U. S. 93 (1958).

We do not read *Local 761 (General Electric Co.) v. N.L.R.B.*, *supra*, to conflict with our disposition of the case at bar.

The dissent (R. 408-418) would—on the facts of this case—disregard both the locus of the picketing and the ownership of the property picketed and find the picketing not to be violative of section 8(b)(4)(B) since the picketing was only designed to reach neutral employees whose tasks aided Carrier's everyday operations and, therefore, was legitimate primary activity (R. 415-416).

SUMMARY OF ARGUMENT

I

A. In 1959 the Congress amended Section 8(b)(4) of the Act to extend said section's protection to railroads and their employees. The stimulus for such amendment was precisely the kind of adjacent railroad site picketing and violence engaged in by petitioners in this case; and the

legislative history of said amendment to Section 8(b)(4) demonstrates that it was the clear intent of Congress to proscribe such conduct. By refusing to extend this contemplated protection of the statute to the railroad and railroad employees here involved, the Board acted in direct contravention of congressional purpose.

B. Congress in fact did amend Section 8(b)(4)(B) of the Act to proscribe exactly what it intended to proscribe and, as the Board concedes, petitioners' conduct falls within the literal proscription of said Section 8(b)(4)(B).

C. The Board decision herein either discriminates against railroads by refusing them the protection extended to nontransporters of goods under Section 8(b)(4)(B) of the Act; or said decision stands for an unwarranted decimation of said Section 8(b)(4)(B). Both alternatives are contrary to law.

D. Petitioners' conduct complained of herein took place at premises separately owned by a completely independent secondary employer with whom petitioners had no dispute. Without explanation, the Board says this separateness of corporate identity and ownership is immaterial. Such disregard by the Board for separate and private ownership is inconsistent with its own contemporary decisions and is contrary to law.

E. In *General Electric* this Court dealt with restrictions on, and permissible limits of, primary picketing and did not intend to relax the law's sanctions against purely secondary picketing such as confronts the Court in this case. Accordingly, the Board in its decision herein erred in utilizing the *General Electric* rationale to avoid applying the proscriptions of Section 8(b)(4)(B) to the picketing herein.

II

Even if this case were to be regarded as being analogous to a common situs problem wherein it is normally proper to balance the legitimate conflicting interests of unions and neutral employers, petitioners' threats, restraint and coercion directed to railroad supervisors are still violative of Section 8(b)(4)(ii)(B) of the Act in that the balancing of interests doctrine only applies where the union conduct is otherwise lawful. Here, petitioners' threats, restraint and coercion were held by the Board to be violative of Section 8(b)(1)(A) of the Act.

ARGUMENT

I. WHEN THE PETITIONING UNIONS, AT PREMISES SOLELY OCCUPIED BY A NEUTRAL EMPLOYER, PICKETED AND COERCED INDIVIDUALS EMPLOYED BY THAT NEUTRAL EMPLOYER WITH THE OBJECT OF FORCING THE NEUTRAL EMPLOYER TO CEASE TRANSPORTING MATERIALS OF A PRIMARY EMPLOYER WITH WHOM THE UNIONS HAD A LABOR DISPUTE, SAID UNIONS VIOLATED SECTION 8(b)(4)(i) AND (ii)(B) OF THE ACT.

A. The Board's Decision is in Direct Contravention of the Congressional Purpose Expressed in the Labor-Management Reporting and Disclosure Act of 1959 to Bring Railroad Employees Within the Protection of the Secondary Boycott Provisions of the Act.

Section 704(a) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 542-543, amended Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. 158(b)(4), by extending the protection of said section to a "person" engaged in commerce, as well as any individual employed thereby. Previously, Section 8(b)(4) had only protected "employees" and "employers."

The legislative history of this amendment shows a clear intent both by proponents and opponents thereof to protect railroads and railroad employees from secondary boycotts. Senator Morse, who cast one of the two votes in the Senate against the bill on final passage, in speaking of his willingness to go along with some modifications on the subject of secondary boycotts, said:

Similarly [sic], a secondary boycott carried out by inducing railroad employees should not be permitted, merely because the employees' employer is not covered

by the Act. (105 Daily Cong. Record 16397, September 3, 1959.)

Further, the then Senator Kennedy and Congressman Thompson prepared an analysis of the secondary boycott amendments contained in the Landrum-Griffin Bill after it passed the House; and although some changes were made affecting the analysis during the conference, they do not detract from the relevance of the following statements contained therein:

1. Railroad-Airline, and Public Employees

The NLRA definitions of "employer" and "employee" exclude various special categories of employees among them agricultural workers, Government employees and employees of railroads and airlines who are subject to the Railway Labor Act. Since Section 8(b)(4) presently speaks of inducing "the employees of any employer," it does not apply to these groups.

The House bill extends the prohibition to secondary boycotts by agricultural workers, Government employees and employees of railroad and airlines. Apparently the theory is that the omission was simply a mistake in the original draftsmanship.

The unions argue that since these groups receive none of the benefits of the NLRA they should be subjected to none of the burdens. The railway labor organizations particularly dislike the prospect of involvement with the NLRB. These arguments have some appeal but they do not carry much weight since the employees who would be forbidden to engage in secondary boycotts have little to gain or lose from such activity.

We could not seriously object to revising the present law in this respect. (105 Daily Cong. Record 15220-15221, August 20, 1959; Legislative History of the La-

bor-Management Reporting and Disclosure Act of 1959, volume 2, pages 1706-7.)

Lastly, Congressman Griffin, one of the authors of the House bill, in his analysis of the conference agreement, said with respect to the secondary boycott amendment that it:

3. Closes loopholes which permitted secondary boycotts involving railroads, municipalities, and governmental agencies because their employees were not "employees" under definition in the act. (105 Daily Cong. Record 16539, September 3, 1959; Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, volume 2, page 1712.)

As pointed out in the dissent of Board Member Rodgers in the Board decision herein (R. 369-370), these so-called "loopholes" were brought about by the Board's repeated holdings that railroad employees were not employees within the meaning of the Act and therefore were not entitled to the protection of the Act's secondary boycott provisions. *International Brotherhood of Teamsters (The International Rice Milling Co.)*, 84 NLRB 360 (1949); *International Woodworkers of America (W. T. Smith Lumber Co.)*, 116 NLRB 1756 (1956); *International Brotherhood of Teamsters (The Alling & Cory Company)*, 121 NLRB 315 (1958); *Lumber & Sawmill Workers Local Union 2409 (Great Northern Railway Co.)*, 122 NLRB 1403 (1959). This theory of the Board was uniformly discredited in every case where the issue was presented to a Court of Appeals, *International Rice Milling Co. v. N.L.R.B.*, 183 F.2d 21 (C.A. 5, 1950); *W. T. Smith Lumber Co. v. N.L.R.B.*, 246 F.2d 129 (C.A. 5, 1957); *Great Northern Railway Co. v. N.L.R.B.*, 272 F.2d 741 (C.A. 9, 1959); and was repudiated by the United States Supreme Court, *Teamsters Union v. N.Y., N.H. & H.R. Co.*, 350 U.S. 155 (1956).

The practical difficulty of the railroads prior to the 1959 amendments was the lack of statutory protection for them from the very type of picketing here confronting this Court; i.e., picketing of railroad property adjacent to or nearby the property of the industrial employer with whom the unions had a labor dispute. This is demonstrated by the fact that this type of picketing was involved in all of the above-cited Board cases.

Thus, in *International Rice Milling*, 84 NLRB 360 (1949), the union was picketing entrances to the primary employer's plant and then extended its picketing and acts of violence to the adjacent and nearby tracks of the railroads serving the primary employer's plant. The Board refused to find a violation of Section 8(b)(4) on the ground that the railroad was not an employer within the meaning of the Act and, therefore, was not entitled to the protection of said Section 8(b)(4).²

Another parallel is found in the *Great Northern Railway* case where a primary strike was first confined to entrances of the employer's plant proper. Later when the railroad attempted to switch cars on to the primary premises the picketing was broadened to include the railroad spur serving the plant. The Board, although concluding that the picketing was a deliberate and direct appeal to the train crews to engage in a concerted refusal to switch the cars, again dismissed on the basis that railroad employees were not covered by the secondary boycott provisions. When the case was reversed on this point and remanded, the Board found a violation without expressing the slightest

² The Court of Appeals reversed the Board on this point, *International Rice Milling Co. v. N.L.R.B.*, 183 F.2d 21 (C.A. 5, 1950); and thereafter, in accordance with said court's decision, the Board ordered the union to cease and desist from such adjacent railroad spur type picketing. *International Rice Milling Co.*, 95 NLRB 1420 (1951).

concern about the fact that the railroad spur served only the employer's plant. *Lumber and Sawmill Workers Local Union 2409 (Great Northern Railway Co.)*, 126 NLRB 57 (1960). It was enough that secondary employees were being induced at the premises of a secondary employer.

Nor can there be any doubt that adjacent right of way picketing, and the Board's treatment thereof, were indeed the "loopholes" which the Congress intended to close. This is not only demonstrated by the legislative history of the 1959 amendments but was conceded in 1960 by the then General Counsel of the Industrial Union Department, AFL-CIO; and is now admitted by the Board.

Thus, it was precisely the adjacent railroad spur type of picketing and violence found in the original Board decision in the *International Rice Milling* case (84 NLRB 360)—and here—which the advocates of closing the railroad "loopholes" presented to the Congress in justification of the needed legislation.³ Further, it was precisely the failure of the Senate Committee on Labor and Public Welfare, in reporting out S. 1555, to provide for the closing of the "loophole" represented by the adjacent railroad spur type picketing found in the original Board decision in *International Rice Milling* which caused Senators Dirksen and Goldwater to criticize said bill⁴ and which led to an attempted amendment of said S. 1555 by Senators Dirksen and Goldwater.⁵ Although the Dirksen-Goldwater amend-

³ Part 5, Hearings before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, Eighty-Sixth Congress on H.R. 3540, H.R. 3302, H.R. 4473 and H.R. 4474; pp. 1846-1860, at p. 1847; Published by the United States Printing Office, Washington, 1959.

⁴ S. Rep. No. 187 on S. 1555 (minority views), Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Volume 1, p. 476.

⁵ 105 Daily Cong. Record 5747, 5764, April 21, 1959.

ment was defeated, the Senate eventually acceded to the Landrum-Griffin proposals of the House with the result that, as enacted, the 1959 amendments closed the railroad "loophole" in precisely the same language and manner as contemplated by the aforesaid Dirksen-Goldwater amendment. In a memorandum analyzing the various provisions of the 1959 amendments, as enacted⁶, Senator Goldwater stated as follows⁷:

The Kennedy-Ervin bill (S. 505), as introduced, contained no provision dealing with secondary boycotts. In committee, I offered the secondary boycott provision of the administration's labor reform bill as an amendment. It was, in substance, the same as the new provisions described above. It was rejected and the bill as reported contained no such provision. On the Senate floor, Senator McClellan offered a secondary boycott amendment which, in substance, was the same as that offered in committee by me. The amendment was not agreed to.

The Landrum-Griffin bill contained a provision on secondary boycotts, for all purposes practically the same as that contained in my rejected amendment. With the exceptions noted above, the conference report adopted these provisions of the Landrum-Griffin bill.

Moreover, in a 1960 law review article co-authored by the then General Counsel of the Industrial Union Department, AFL-CIO, it was stated⁸:

Advocates of tightening these [secondary boycott] restrictions, however, argued that the National Labor Relations Board and the courts had so interpreted section 8(b)(4) as to leave a number of gaping loop-

⁶ 105 Daily Cong. Record A8509-A8526, October 2, 1959.

⁷ 105 Daily Cong. Record A8523, October 2, 1959.

⁸ *Title VII: Taft-Hartley Amendments, with Emphasis on the Legislative History*, 34 Northwestern Univ. Law Review 747, 756-757, Arthur J. Goldberg and Kenneth A. Meiklejohn.

holes through which genuinely neutral employers and their employees continued to be victimized by the use of the secondary boycott.²⁶

The new law closes these so-called loopholes in the following manner:

(2). Formerly, section 8(b)(4) did not apply to inducement of employees of employers not covered by the National Labor Relations Act, as amended (*International Rice Milling*²⁸ . . .). The new act prohibits inducement of employees of any person engaged in commerce . . . including . . . railroad employees.

²⁶ S. Rep. No. 187, 86th Cong., 1st Sess. 78 (1959) (minority views).

²⁸ 84 NLRB 360 (1949).

As noted above, the original Board decision in *International Rice Milling* cited by the now Mr. Justice Goldberg countenanced the same type of adjacent railroad spur picketing as is involved in the instant case.

Finally, the Board in its brief to this Court in this case (Bd. Br. p. 23, n. 17 and related text) illustrates the "loophole" which Congress intended to close by the 1959 amendments by citing cases involving the same type of adjacent railroad spur picketing which now confronts this Court in this case.

Accordingly, Carrier submits, it is patent that it was exactly the type of factual situation now before this Court which led the Congress to extend the protection of Section 8(b)(4) to railroads and railroad employees. The Board decision herein is in complete derogation of that Congressional purpose and would in fact result in even less protection than that which the courts were seeking to provide when the 1959 amendments were enacted.

B. It is not Disputed that Petitioners' Conduct Herein Falls Within the Literal Proscription of Section 8(b)(4)(B).

Before proceeding to an analysis of pertinent case law and facts, Carrier emphasizes that the immediately preceding treatment of the legislative history of the 1959 amendments was not necessitated by any ambiguity in the language of Section 8(b)(4)(B). To the contrary, the legislative history was offered to show that Congress intended to proscribe that which it explicitly did proscribe: the picketing of railroad-owned spur tracks adjacent to or nearby the industrial plant of a primary employer with whom a union has a labor dispute.

In short, petitioners' conduct herein falls within the literal proscription of the provisions of Section 8(b)(4)(B) and the Board admits that it does. Thus at page 12 of its brief to this Court the Board states:

... It is clear that the acts [of petitioners] complained of in the present case are covered by clauses (i) and (ii) [of Section 8(b)(4)]. Moreover, since the "object" of the picketing was to bring about a cessation of the railroad's normal services to the struck plant, the conduct appears to come within the literal terms of clause (B) [of Section 8(b)(4)]...

We thus start with the proposition that Congress intended to proscribe petitioners' conduct herein and in fact enacted statutory language which unambiguously effected such intent. It would seem this is not only a start but an end to the questions before this Court. But notwithstanding the above, the Board insists that petitioners' picketing is primary in nature and therefore not proscribed by Section 8(b)(4)(B) of the Act. It is to this proposition we now turn our attention. At the outset, however, it is noted that

the Board never answers one important question. If the Congress did not consider adjacent railroad spur type picketing to be secondary, why did Congress specifically amend the secondary boycott provisions of Section 8(b)(4) to proscribe it? Does the Board contend that its so-called expertise should override both the literal language of the statute and congressional intent?

C. The Board Decision Herein Either Discriminates Against Persons Engaged in the Transport of Goods or Presages the Administrative Repeal of Section 8(b)(4)(B) of the Act.

To better understand the full import of the Board decision herein it is helpful and perhaps essential to summarize the instant facts without regard to the type of services rendered to Carrier by the railroad herein. Thus stated, the facts show the following. Petitioners' picketing took place on and at a gate leading to premises owned by a secondary employer, upon which only employees of the secondary employer entered or worked, and where the work performed consisted of that done in the secondary employer's normal business relations not only with Carrier but with several other employers; to wit: Western Electric, General Electric and Brace-Mueller-Huntley.

Obviously, when so framed the descriptive facts herein would embrace picketing at a secondary railroad's central freight office; at a store of a secondary employer where Carrier products—among others—were sold or used; or, in fact, at the industrial plant or establishment of any secondary employer having normal business relations with—among others—Carrier. Moreover, the facts *must* be so framed; i.e., without regard to the *type* of business relationship between the primary and secondary employers; if we

are to reach a result herein which would not unlawfully discriminate against railroads. This is so because the normal business of railroads is the transport of goods and the proscribed objects set forth in clause (B) of Section 8(b)(4) do not distinguish between the types of business relationships involved. Thus, said clause (B) proscribes "forcing or requiring any person to cease using, selling, handling, *transporting*, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . ."

With this established, it is essential to inquire whether the Board in this case intended to discriminate against transporters of goods or whether it would countenance picketing at the premises of any similarly situated secondary employer having normal business relations with Carrier. Stated another way, the question presented is what factors—other than the *type* of business relations between Carrier and the railroad—could have led the Board to call the picketing herein primary rather than secondary.*

Accordingly, let us examine the other factors present in this case. They consist of the normal business relations between the primary and secondary employer; the fact that petitioners' picketing, threats and other coercive tactics were only aimed at making the secondary employer (the railroad) cease doing business with the primary employer (Carrier) and not at stopping the business relations between the railroad and its other customers (i.e., Western Electric, General Electric, and Brace-Mueller-Huntley); the fact that the picketed premises of the secondary employer adjoined or were nearby those of the primary em-

* As noted above (*supra*, p. 18, the Board considers the crucial question herein to be whether Petitioners' picketing was primary or secondary (Bd. Br. p. 12).

ployer; and the fact that the picketed premises of the secondary employer once belonged to the primary employer.

Examining these four factors in turn, it becomes quickly apparent that the existence of a normal business relationship between Carrier and the secondary employer could not properly militate against affording the secondary employer the protection of Section 8(b)(4)(B). Thus, where the neutral employer was a purchaser of the primary employer's products, picketing of the neutral employer's establishment clearly would be unlawful. *Electrical Workers (Samuel Langer) v. Labor Board*, 341 U.S. 694 (1951). The same result would obtain if the neutral employer was a supplier of the primary employer, *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951); or delivered the primary employer's products, *Carpenters Union (Sand Door and Plywood Company) v. N.L.R.B.*, 357 U.S. 93 (1958); *N.L.R.B. v. Local 294, Internat'l Bro. of Teamsters (Bonded Freightways, Inc.)*, 273 F.2d 696 (C.A. 2, 1960); or handled the primary employer's products at a trucker's dock, *Highway Truck Drivers & Helpers Local 107 (Virginia-Carolina Freight Lines, Inc.) v. N.L.R.B.*, 273 F.2d 815 (C.A. D.C., 1959); and see particularly *N.L.R.B. v. Associated Musicians (Gotham Broadcasting Corp.)*, 226 F.2d 900 (C.A. 2, 1955). Indeed, it would be highly unusual if the activity of the secondary employer, other than in some construction cases, was not related to the normal operations of the primary employer. Otherwise, there would be little point in the union's attempt to involve the secondary employer or his employees and thus put economic pressure on the primary employer.

Similarly, the fact that the object of petitioners' conduct was to make the secondary employer cease doing business only with Carrier and not its other customers is no legiti-

mate basis upon which to withhold the protection of Section 8(b)(4)(B). For as the Board pointed out in its main brief to this Court in *Electrical Workers (General Electric Co.) v. Labor Board*, 366 U.S. 667 (hereinafter sometimes called the *General Electric* case):

... Section 8(b)(4)(A) bans partial no less than total refusals to work . . .¹⁰

Indeed, a contrary conclusion would make little sense. Section 8(b)(4)(B) proscribes the forcing of a secondary employer to cease doing business with a primary employer. It is not a prerequisite for unlawfulness that the union force the secondary employer to cease doing business with *all* other employers.

The next factor presented is Carrier's sale of the secondary premises herein to the railroad some eleven years before the occurrence of the labor dispute herein. There, although the Board does not even allege that said property was sold for other than valid economic reasons, it professes alarm over this sale; and, in support, offers the conjecture that any employer could prevent union appeals to neutral delivery employees "merely" by deeding its parking areas and driveways to a secondary employer (Bd. Br., p. 22). There are several answers to this. First, there is no such discriminatory motivation behind the sale in this case. Second, the sale envisaged by the Board would be motivated—clearly so—by a desire to interfere with le-

¹⁰ Main brief for the National Labor Relations Board, p. 37, in *Electrical Workers v. Labor Board*, 366 U.S. 667. In footnote 32 of said brief, pp. 36-37, the Board cites some 10 federal court decisions in support of this well established proposition, including the decision of this Court in *Local 1976, Carpenters' Union v. N.L.R.B.*, 357 U.S. 93, 96-97. (the refusals to handle American Iron freight). Note: Prior to the 1959 amendments the proscriptions now found in clause (B) of Section 8(b)(4) appeared in clause (A) thereof.

gitimate concerted activity protected by Section 7^o of the Act and, therefore, would in all probability be set aside—similar to other discriminatorily motivated acts of employers—as being in violation of Section 8(a)(1) or (3) of the Act. Third, the Board's fears are completely divorced from the realities of economic life. To emphasize this, let us again eliminate—for the moment—the Board's preoccupation with the accoutrements of transporters of goods; i.e., parking lots, driveways, and railroad tracks; and substitute other physical facilities of industry. Thus transposed—and it must be transposed unless the Board is bent upon discriminating against transporters of goods—the Board would apparently fear that if J. C. Penney were engaged in a labor dispute at one of its stores, it would sell the remainder of its stores to Sears & Roebuck and thus prevent a union from picketing such other stores. Clearly, the Board's fears are fantasy. Also, judging from the fact that the property sale in this case preceded the labor dispute by some eleven years, the Board's approach would bottom an 8(b)(4) violation on a title search to see if the primary employer *ever* owned the secondary premises. And surely the Board will not contend that it would have found petitioners' conduct herein violative of Section 8(b)(4) (B) if the primary labor dispute had been with one of the other three employers having plants adjacent to the railroad's premises—employers who never owned what is now the railroad's property.

The last factor for consideration is the adjacent nature of the two premises herein involved; and in this regard it is first noted that the Board has never before measured the legality of secondary boycotts with an odometer. Thus, as noted above, in *Great Northern Railway Co.*; 122 NLRB 1403, the Board refused to find that the picketing of an

adjacent railroad spur was violative of Section 8(b)(4) and based said refusal on the ground that railroad employees were not covered by said section's secondary boycott provisions. When the Court of Appeals reversed the Board on this point; *Great Northern Railway Co. v. N.L.R.B.*, 272 F.2d 741 (C.A. 9, 1959); the Board found a violation of Section 8(b)(4) without expressing the slightest concern over the fact that the railroad's premises were adjacent or nearby to the primary employer's plant. *Great Northern Railway Co.*, 126 NLRB 57. The same substantive facts and sequence of events are present in *International Rice Milling Co.*, 84 NLRB 360 (1949); *International Rice Milling Co. v. N.L.R.B.*, 183 F.2d 21 (C.A. 5, 1950); and *International Rice Milling Co.*, 95 NLRB 1420. Moreover, in *N.L.R.B. v. Denver Bldg. Trades*, 341 U.S. 675, a secondary boycott case, this Court stated (pp. 689-690):

We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other.

And in *Bachman Machine Company v. N.L.R.B.*, 266 F.2d 599 (C.A. 8, 1959)—another secondary boycott case where both the primary and secondary employers operated industrial plants—the court, in commenting on this Court's above-quoted language in *Denver Bldg. Trades*, stated (p. 605):

This would seem to indicate that the proximity of employers to each other was not of significance.

Carrier concurs. To accept the Board's holding in the instant case would be to redefine the term "secondary em-

ployer" so as to make such designation dependent on the physical distance of the primary employer's plant from that of the secondary employer; and under such interpretation there could be no logical delineation between a secondary employer whose plant was separated from the primary employer's plant by a common wall, an open lot, a city block or many miles. Clearly, once the picketing extends to the situs of a separate employer—whether such situs be adjoining or distant—the sole test of its unlawfulness is its object. And here the petitioners' object was admittedly (Bd. Br. p. 12; R. 325) the proscribed one of forcing the railroad to stop doing business with Carrier. Any fiction that petitioners' conduct at the railroad's gate was merely incidental to the primary strike and was not aimed at forcing the railroad to cease doing business with Carrier is dispelled by the fact that when the pickets became aware that an attempt was being made to serve Carrier, they crossed to the west side of Thompson Road and onto railroad property to meet the train and commence their physical obstruction of its progress (R. 320-321, 87-88). Importantly, this particular piece of conduct by the petitioners took place on railroad property not adjoining Carrier's plant, but on railroad property separated from the Carrier plant by a highway. This but illustrates the impossibility of attempting to define secondary activity in terms of its physical distance from the primary employer's premises; and the question could be asked of the Board how far would it permit the strikers to go up the railroad's tracks on the railroad's right of way to meet, obstruct and restrain the incoming train? Again, it is submitted that there can be no possible logical delineation in terms of physical distance as to where such conduct would become unlawful. And, of course, the practical effect of a contrary contention would be to penalize those many employers who have clustered

together for legitimate economic reasons and who have thereby created industrial centers across the land.

Accordingly, by virtue of the foregoing process of analyzing factors herein without regard to the type of business relation between Carrier and the railroad it becomes evident, we submit, that there is no nondiscriminatory support in this case for the Board's conclusion that petitioners' conduct herein was primary, not secondary. Clearly, the preoccupation of the Board and petitioners with pick-ups and deliveries has led them to improperly submerge the requirements of Section 8(b)(4)(B) that transporters of goods be given the same protection as companies who are engaged in "using, selling, handling, . . . or otherwise dealing in the products of any other producer, processor or manufacturer . . ." This is further evidenced throughout the briefs filed herein by the Board and petitioners in their repeated allusions to the railroad gate as, or analogous to, a plant delivery gate of Carrier. In fact, said gate does not open on to Carrier property. And again, if we summarize the instant facts without the Board's discriminatory accent on the type of service rendered to Carrier by the railroad, we have the Board improperly refusing to invoke the proscriptions of Section 8(b)(4)(B) in a situation where the picketing takes place on and at a gate leading to premises owned by a secondary employer; premises upon which only employees of the secondary employer enter or work; premises where the work of the secondary employees is in support of the secondary employer's normal business relations with several other employers besides the employer with whom the union has its primary labor dispute. As noted at the outset of this portion of the brief, the Board decision herein either discriminates against all persons engaged in the transport of goods or it stands for an un-

warranted decimation of the protection afforded by Section 8(b)(4)(B) of the Act. The former is suggested. Both are contrary to law.

D. The Board Improperly Disregards the Concept of Private Property as Immaterial to its Decision Herein.

Carrier owns the primary premises herein. The New York Central Railroad owns the picketed secondary premises herein. Carrier and the New York Central Railroad are separate corporate entities. They are not commonly owned.

None of the above is disputed. The Board merely says it is immaterial (R. 365). It does not say why. Indeed, the short shrift given the concept of private ownership in the Board's decision suggests the concept was first noticed after the Board reached its conclusion therein; and then, not being able to reconcile the two, the Board sought to make the fact of separate ownership disappear by labeling it immaterial.

However, and whatever the Board chooses to say or not say, its disregard of the separate and private ownership herein is improper; and we know of no prior case where primary employees did not work or go upon the secondary premises—excepting certain “ally” doctrine situations not pertinent here—in which separate ownership and occupancy of premises did not determine whether said premises were primary or secondary.

Further, the Board has held that the secondary boycott provisions of Section 8(b)(4) “do not isolate one store in . . . [a] Company's chain from the other stores therein, nor do those provisions provide that economic pressure may be applied upon a primary employer only at the segment of his operations at which the immediate dispute arose.” See *International Bro. of Teamsters (Alexander Warehouse)*,

128 NLRB 916, 919-920, n. 6 (1960). Accordingly, it appears that at least where the concept of corporate entity works to permit picketing, the Board considers it extremely important. Similarly, where a union picketed the wholly-owned subsidiary of a parent company with which the union had a primary dispute, the fact of the two companies' common ownership was emphasized by the Board in holding that said picketing was not proscribed by Section 8(b)(4). See *Local 200, Teamsters (Milwaukee Plywood)*, 126 NLRB 650 (1960). Also, in certain of the "ally" doctrine cases; *J. G. Roy & Sons*, 118 NLRB 286 (1957); *Bachman Machine Company*, 121 NLRB 1229 (1958); the Board found separate ownership of companies so important that in its absence the Board felt compelled to infer that the companies therein were under common control and thus—despite their separate corporate entities—that a union having a labor dispute with one could picket both. The Courts of Appeals, however, reversed both said Board decisions on the ground that common ownership of the involved companies was insufficient to disregard the separate corporate identities of said companies, and thus was insufficient to classify them as a single employer for the purposes of Section 8(b)(4). *J. G. Roy & Sons v. N.L.R.B.*, 251 F.2d 771 (C.A. 1, 1958); *Bachman Machine Company v. N.L.R.B.*, 266 F.2d 599 (C.A. 8, 1959). Thereafter, the Board acceded to the views of these Courts of Appeals that even common ownership of companies was insufficient to offset their separate corporate identities for the purposes of Section 8(b)(4). See *Amalgamated Lithographers*, 130 NLRB 985, 989, n. 12 and related text; and *Miami Newspaper Printing Pressmen*, 138 NLRB 1346, particularly at page 1352 where the Trial Examiner stated:

... By citing the court decisions in the *Roy* and

Bachman cases, the Board unambiguously indicated that it acquiesced in the principle enunciated by the Circuit Courts of Appeals in said cases that in order to establish that two corporations are a single employer with respect to Section 8(b)(4), there must be common ownership and active, not merely potential, common control.

Accordingly, in 1962 we have the Board in *Miami Newspaper*—where the companies were commonly owned—emphasizing the importance of separate corporate identity to accord a newspaper the protection of Section 8(b)(4). And now and in 1961 (both before and after the *Miami Newspaper* case) we have the Board urging the immateriality of separate corporate identity and ownership to deny the protection of Section 8(b)(4) to a railroad. Patently, it is submitted, the Board's treatment of the railroad herein is disparate and improper.

It is suggested that the Board might well have looked to the language of this Court in *N.L.R.B. v. Denver Bldg. Trades Council*, 341 U.S. 675, where the Court rejected a contention that the close physical proximity and business relationship of two employers should deny the secondary employer the protection of Section 8(b)(4). It said (p. 690):

The business relationship between independent contractors is too well established in the law to be overriden without clear language doing so.

Even more well established are the concepts of private property and ownership. Indeed, the entire economic structure of this country is based on these concepts; and, it is submitted, it would be unconscionable to allow any Board decision to stand—including this one—which is premised on the proposition that they are immaterial.

E. The Board's Decision Herein is Contrary to Law and Finds no Support in the Opinion of this Court in the General Electric case.

The case upon which the Board relies to support its decision below is *Local 761, Electrical Workers v. N.L.R.B.*, 366 U.S. 667 (1961). Its reliance is misplaced.

The *General Electric* case arose out of a strike at General Electric's Louisville, Kentucky, plant by the certified union at the plant. Picketing was conducted at all plant gates, including a separate gate reserved exclusively for employees of outside contractors doing work at the plant. The Board found the picketing of the separate gate to be a violation of Section 8(b)(4)(A) of the Taft-Hartley Act because its object was "to enmesh" employees of neutral employers in the union's dispute with General Electric, thereby encouraging these employees to engage in a concerted refusal to work with an object of forcing the neutral employers to cease doing business with General Electric.¹¹ Enforcement of the Board order was granted by the Court of Appeals for the District of Columbia Circuit.¹²

The Supreme Court, quoting with approval the opinion of the court in *United Steelworkers of America (Phelps Dodge Refining Co.) v. N.L.R.B.*, 289 F.2d 591 (C.A. 2, 1961), remanded the case, holding that picketing of the separate gate was unlawful only if use of the gate was confined to neutral employees performing work unrelated to the normal operations of the struck employer.

It is here emphasized that unlike the railroad gate in the instant case, the gate in *General Electric* was owned and

¹¹ *Local 761, Electrical Workers (General Electric Co.)*, 123 NLRB 1547, 1550 (1959).

¹² *Local 761, Electrical Workers (General Electric Co.) v. N.L.R.B.*, 278 F.2d 282 (C.A. D.C., 1960).

controlled by the primary employer, and opened upon premises which were owned by the primary employer and upon which the employees of the primary employer also worked. With such emphasis, it can be seen that the Court in *General Electric* had no reason to and did not attempt to change the rules regarding picketing at common or secondary premises but merely placed an additional restriction on picketing at primary premises. This is evident by the Court's approving citation—in *General Electric*—of *Moore Dry Dock*, 92 NLRB 547, the Board's lead common situs case. The Court stated (366 U.S. 667, 679):

... The application of the *Dry Dock* tests to limit the picketing effects to the employees of the employer against whom the dispute is directed carries out the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Bldg. & Constr. Trades Council*, *supra* (341 US at 692). (Emphasis supplied)

Accordingly, it is still the rule even in common situs cases (where premises are owned by a neutral or secondary employer) that the union may not—as it did in the instant case—specifically direct its picketing activities at neutral employees in a deliberate effort to enmesh them in a labor dispute not their own. The *General Electric* case only holds, it is submitted, that picketing at premises owned by the primary employer may still be proscribed under the "enmeshing" theory where the work of the neutral employees at the primary premises does not relate to the normal operations of the primary employer. In this regard, we note that the court in *General Electric* singled out for

attention the Board's decision in *Crystal Palace Market*, 116 NLRB 856 thusly (366 U.S. 667, 678-679):

The Board's application of the *Dry Dock* standards to picketing at the premises of the struck employer was made more explicit in *Retail Fruit & Vegetable Clerks (Crystal Palace Market)*, 116 NLRB 856. The owner of a large common market operated some of the shops within, and leased out others to independent sellers. The union, although given permission to picket the owner's individual stands, chose to picket outside the entire market. The Board held that this action was violative of § 8(b)(4)(A) in that the union did not attempt to minimize the effect of its picketing, as required in a common-situs case, on the operations of the neutral employers utilizing the market. "We believe . . . that the foregoing principles should apply to all common situs picketing, including cases where, as here, the picketed premises are owned by the primary employer." 116 NLRB, at 859. . . . The Board made clear that its decision did not affect situations where picketing which had effects on neutral third parties who dealt with the employer occurred at premises occupied solely by him. "In such cases, we adhere to the rule established by the Board . . . that more latitude be given to picketing at such separate primary premises than at premises occupied in part (or entirely) by secondary employers." 116 NLRB, at 860, note 10.

In sum, Carrier submits that although the court in *General Electric* gave heed to the "balancing of interests" approach—used in common situs cases—to resolve the primary picketing problem involved in *General Electric*, it did not intend to disturb the existing balance and law relating to picketing at premises not owned or occupied solely by the primary employer.

Carrier further submits that petitioners' picketing herein was purely secondary and, therefore, that no balancing of

interests is required. Again, the picketed premises herein were solely owned and occupied by the secondary employer; and the primary employees did not work or enter upon said secondary premises. Further, although petitioners had no dispute with the railroad or its employees, they deliberately directed picketing and violence at individuals employed by the railroad at the secondary premises. Nor is there involved any roving or "ambulatory" situs of the primary employer. And, of course, as the Board concedes (Bd. Br. p. 12), petitioners' picketing, threats, restraint and coercion here complained of fall within the liberal proscription of Section 8(b)(4)(i) and (ii)(B) of the Act. We know of no case involving even similar facts and union conduct where the Board or any court found it necessary to "balance interests" before proscribing such purely secondary conduct. As stated by Senator Taft (93 Cong. Record 4198) in discussing Section 8(b)(4):¹³

It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts.

Accordingly, the Congress enacted Section 8(b)(4). The Board having refused to give effect to said section herein, its decision should be set aside. In the instant case there were eight gates leading directly to Carrier's property which the petitioners could and did picket (R. 316, 311; G.C. Exh. 9). Under such circumstances, to hold that picketing at the separate property of the railroad must be permitted in order to maintain effective primary picketing is to hold that the petitioners' interests are not protected

¹³ Senator Taft was the Senate sponsor of the bill containing said section and was the chairman of the Senate Committee on Labor and Public Welfare in charge of the bill.

unless they can maintain a secondary boycott. The purpose of Section 8(b)(4), it is submitted, is the proscription and not the furtherance, of secondary boycotts.

II. ASSUMING ARGUENDO THAT THE BALANCING OF INTERESTS DOCTRINE IS GENERALLY APPLICABLE TO THIS CASE, THE BOARD STILL ERRED IN REFUSING TO FIND THAT THE UNIONS' THREATS TO, AND RESTRAINT AND COERCION OF, RAILROAD PERSONNEL WAS A VIOLATION OF SECTION 8(b)(4)(ii)(B) OF THE ACT.

In this case, as detailed above, the unions threatened, restrained and coerced personnel of the secondary railroad employer, including supervisors, with the object of forcing the railroad to cease doing business with Carrier. Moreover, the union conduct took place at and near the railroad's gate located on and leading to railroad property.

Clearly, and on these facts, petitioners have committed a classic violation of Section 8(b)(4)(ii)(B). At a completely secondary premise they have directed threats specifically at a secondary "person" for an unlawful object. The Board and petitioners, however, assert that the union conduct complained of took place at a primary situs and, therefore, that the balancing of interests doctrine employed by this Court in *General Electric* compels a finding that such union conduct did not violate Section 8(b)(4). On this point, Carrier's position is that even if petitioners' threats and violence in fact occurred at a place that would generally require application of the "balancing" doctrine, such conduct was still violative of Section 8(b)(4)(ii)(B) of the Act.

Thus, in *General Electric*, this Court, after first stressing

that the picketing therein complained of was peaceful in nature (366 U.S. 667, at p. 670), went on to base its conclusion on a detailed analysis and evaluation of common situs cases wherein the paramount consideration was to effect a "balance" between the right of unions to conduct peaceful primary picketing and the right of neutral employers to conduct their businesses without interference.

Both of these sometimes conflicting rights, which the courts balance in common situs cases, are bestowed on the parties by the National Labor Relations Act. The employer's right to be shielded from labor controversies not his own is as set forth in Section 8(b)(4), whereas Sections 7 and 13 of the Act safeguard a union's right to engage in concerted activities, including a strike, against the employer with which the union is engaged in a primary labor dispute. *N.L.R.B. v. Denver Bldg. Trades Council*, 341 U.S. 675, 687.

In the instant case, the scale on the railroad's side of this common situs balance is normally weighted. The railroad had no dispute with petitioners. It was pursuing its normal business on its own property. However, insofar as petitioners' threats, restraint and coercion are concerned, the scale on their side of the balance is empty. It is empty because the Board had explicitly decided herein that such conduct was violative of Section 8(b)(1)(A) of the Act. And thus condemned by the Act, it can hardly be said that such conduct is a right thereunder. Nor is such conduct even protected by the Act. As once stated by the now Solicitor General:

Although section 8(b) regulates only the conduct of labor organizations and section 7 deals with the rights of employees, it seems plain that the group activities which section 8(b) forbids a labor organization to lead must fall outside the protection of section 7.

when employees engage in them either with or without the direction of a union. To hold otherwise would disregard legislative history . . . and create an unwarranted anomaly. In the absence of union sponsorship there may be no need for government intervention but surely the activities themselves have no greater claim to affirmative protection.¹⁴

Moreover, the proviso to Section 8(b)(4)(B)¹⁵ exhibits concern only that said clause (B) shall not impinge upon a primary strike or primary picketing *where such strike or picketing is not otherwise unlawful*. There is no statutory solicitation—either in the proviso to said clause (B) or elsewhere—for conduct such as petitioners' herein, which is not only violative of Section 8(b)(1)(A), but which is specifically proscribed by Section 8(b)(4)(ii)(B). As Senator Morse realized,¹⁶ Section 8(b)(4)(ii) does not limit its prohibition to a threat to strike or to induce a strike. The section prohibits *any* threat to a secondary "person"; and, it is submitted, there is no reason in logic, law, legislative history or common justice to excuse or protect violence or threats of physical violence on the basis of where they were made or how they were transmitted. Such conduct is equally vicious at any location and should be equally condemned. Petitioners engaged in such violence and made such threats herein; and it specifically directed them at a secondary "person" with the object of making said person cease doing business with Carrier.

In sum, petitioners have done what is specifically prohibited by the language of Section 8(b)(4)(ii)(B) and they

¹⁴ *The Right to Engage in Concerted Activities*, Archibald Cox, 26 Ind. L.J. 319, 325 (1951).

¹⁵ "Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

¹⁶ 105 Daily Cong. Record 1426, September 3, 1959.

have done these things without even the color of support from any balancing right under the Act. Under such circumstances, Carrier submits that to depart from the plain language of the statute to excuse petitioners' conduct could only have one result—the encouragement of violence and strong-arm tactics to carry out effective secondary boycotts.¹⁷

¹⁷ The reliance of the Board majority on *Labor Board v. International Rice Milling Co.*, 341 U.S. 665 (1951) in refusing to find a violation of Section 8(b)(4)(ii)(B) is misplaced. In that case this Court held that union violence could not overcome or replace the Board's failure to show the union's object was to secure concerted activity. In the instant case there are no missing elements of proof. On the contrary, it is the Board and petitioners which seek to be excused from the precise terms and requirements of the Act.

CONCLUSION

For the reasons set forth above, the judgment in the Court of Appeals below should be affirmed.

Respectfully submitted,

THEOPHIL C. KAMMHOLZ
FRANCIS F. SULLEY
105 South La Salle Street
Chicago 3, Illinois

KENNETH C. MCGUINNESS
1815 H. Street, N.W.
Washington 6, D. C.

DAVID W. JASPER
Carrier Parkway
Syracuse 1, New York

JOHN E. LYNCH
Syracuse, New York

*Attorneys for Carrier
Corporation*

VEDDER, PRICE, KAUFMAN & KAMMHOLZ
105 South La Salle Street
Chicago 3, Illinois
Of Counsel.